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# THE FUTURE OF THE ENVIRONMENTAL ENFORCEMENT INJUNCTION AFTER *OHIO V.* *KOVACS*

Catherine A. Kellett\*

## INTRODUCTION

Today, the American people face a costly and dangerous legacy from this century's scientific and industrial growth and development.<sup>1</sup> The manufacture of complex and diverse products that has improved our standard of living also has created waste products that have been disposed of inadequately or improperly, and are now contaminating or threatening to contaminate the natural resources upon which Americans rely.<sup>2</sup>

The cost of cleaning up these waste sites is high.<sup>3</sup> The federal hazardous waste cleanup laws,<sup>4</sup> as well as a panoply of state laws

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<sup>1</sup> The Love Canal at Niagara Falls, New York, is perhaps the most publicized of the hazardous waste disposal sites. It provided the impetus for congressional action on the hazardous waste problem. See Note, *Abating an Imminent Hazard: Injunctive Relief Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980*, 32 BUFFALO L. REV. 787, 791-92 (1983).

<sup>2</sup> Chief among worries about abandoned hazardous waste dumps are threats to groundwater that serves as a drinking water supply. See *United States v. Reilly Tar & Chem. Co.*, 546 F. Supp. 1100 (D. Minn. 1980). However, other problems exist as well. Use of the chemical dioxin to spray roadways contaminated the soil in and around Times Beach, Missouri, and led to the condemnation and purchase of the town by the United States government. See *Missouri Now Fears 100 Sites Could Be Tainted by Dioxin* N.Y. Times, Feb. 5, 1983, at 1, col. 5. Airborne substances also create concern at certain disposal sites. In New Hampshire, asbestos particles from an uncovered dumpsite threatened the health of nearby residents. See *United States v. Johns-Manville Sales Corp.*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20310 (D.N.H. Nov. 15, 1982).

<sup>3</sup> Recent estimates from the Office of Technology Assessment suggest that in the next fifty years, cleanup at 10,000 sites in the U.S. could cost over \$100 billion. 15 ENV'T REP. (BNA) 1908-09 (Mar. 15, 1985).

<sup>4</sup> There are two major federal hazardous waste cleanup laws. The more recent is the

that govern industrial cleanup and disposal practices,<sup>5</sup> provide that those parties responsible for the dangers created by improper disposal are required to bear the costs of eliminating the danger they have caused by paying for the cleanup themselves.<sup>6</sup> To enforce compliance with these statutory requirements, the federal and state governments not only seek recovery of costs that they incur in responding to problems,<sup>7</sup> but they also can seek preliminary injunctions against the offending businesses.<sup>8</sup> Courts are asked to grant remedies to address the threats from hazardous waste dumpsites that impose the remedial costs immediately upon the responsible parties.<sup>9</sup>

As a result of bearing these high costs of cleanup activities, many businesses suffer financially and, in some cases, their executives decide to declare bankruptcy.<sup>10</sup> The federal and state governments

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Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 (Supp. V 1981). CERCLA, also known as the "Superfund" law for its § 9631 Hazardous Substance Response Trust Fund, was passed specifically to deal with the problems posed by past disposal practices such as abandoned waste dumps. See *U.S. v. Wade*, 546 F. Supp. 785, 792 (E.D. Pa. 1982). Hazardous waste is also regulated through the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6987 (1976 & Supp. V 1981). RCRA provides a "cradle-to-grave" system of tracking hazardous waste and its disposal, including licensing and monitoring of hazardous waste facilities. See Goldfarb, *The Hazards of Our Hazardous Waste Policy*, 19 NAT. RESOURCES J. 249, 253 (1979).

<sup>5</sup> Many states have enacted their own Superfund laws. See, e.g., Massachusetts Oil & Hazardous Waste Release Prevention Act, MASS. ANN. LAWS ch. 21E §§ 1-13 (Law Co-op. Supp. 1985). See also Comment, *State Hazardous Waste Superfunds and CERCLA: Conflict or Complement?*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10348 (Nov. 1983). Other state laws address related hazardous substance release and waste disposal problems. For example, Ohio's Water Pollution Control Law, OHIO REV. CODE ANN. ch. 611 (Baldwin 1982), forbids the discharge of toxic pollutants into the waters of the state.

<sup>6</sup> For example, CERCLA provides that parties involved in the creation, transport and ultimate disposal of the waste are liable for the cost of cleanup. 42 U.S.C. § 9607(a) (Supp. V 1981).

<sup>7</sup> Cost recovery under CERCLA is provided in its liability section, 42 U.S.C. § 9607 (Supp. V 1981), that allows the government to recover costs incurred in a federal cleanup effort authorized under the response authority. *Id.* § 9607(a). States and municipalities who clean up sites may also maintain actions under CERCLA against responsible parties. See *id.* §§ 9607, 9611; see also *City of Philadelphia v. Stepan Chem.*, 544 F. Supp. 1135, 1143 (E.D. Pa. 1982).

<sup>8</sup> In CERCLA, the EPA is authorized to seek necessary relief and may issue orders when there may be an "imminent and substantial endangerment" to public health, welfare or the environment from the release of a hazardous substance. 42 U.S.C. § 9606(a) (Supp. V 1981). The Act also specifically authorized the court to grant equitable relief. *Id.* See *infra* note 24 and accompanying text.

<sup>9</sup> Injunctive remedies are used regularly in the federal environmental enforcement scheme. See Comment, *CERCLA Litigation Update: The Emerging Law of Generator Liability*, 14 ENVTL. L. REP. (ENVTL. L. INST.) 10224, 10225 (June 1984); Note, *The Role of Injunctive Relief and Settlements in Superfund Enforcement*, 68 CORNELL L. REV. 706, 711 (1983).

<sup>10</sup> Bankruptcy is not an unanticipated result of allocating cleanup costs to businesses. The federal government anticipated that at certain waste sites, parties responsible for the cleanup of the waste would be either missing or bankrupt. The federal government has administered

then must attempt to enforce environmental regulations, and judgments obtained under them, against bankrupt parties.<sup>11</sup> The bankruptcy laws serve a legitimate purpose to shelter and give relief to financially troubled businesses and individuals. However, because bankruptcy permits a party to free himself from past debts, including debts to the government, it is feared that bankruptcy may become a haven for environmental violators, thus vitiating the ability of government to deter violations.<sup>12</sup> The federal and state governments therefore have proceeded to impose and enforce judgments, specifically injunctions, against debtors, pursuant to express authority in the Bankruptcy Reform Act of 1978.<sup>13</sup> They are attempting to assure when public health and safety are at issue that the debtors ultimately cannot escape their obligations to the government and its citizens.

Governmental attempts to enforce environmental laws against debtors have given rise to a controversy that stems from the irreconcilability of two governmental goals. The federal Bankruptcy Act is designed to rationalize the bankruptcy process, in part through its provisions that shelter and give relief to debtors.<sup>14</sup> Environmental laws are designed to protect citizens, in part by assuring that those who are responsible for dangerous conditions are held accountable for seeing that those conditions are ameliorated.<sup>15</sup> Thus, a debtor who is responsible for costly environmental conditions can only be

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the federal Superfund law to preserve its limited resources for those situations where no responsible party is available to pay the cleanup costs. See H.R. REP. NO. 1016, 96th Cong., 2d Sess. 22, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6119, 6125.

<sup>11</sup> See, e.g., *In re Kovacs*, 681 F.2d 454 (6th Cir. 1982) (action by the state of Ohio against debtor); *United States v. Johns-Manville Sales Corp.*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20310 (D.N.H. Nov. 14, 1982) (federal CERCLA action against debtor).

<sup>12</sup> See Brief for the United States as *Amicus Curiae* Supporting Petitioner at 2, *Ohio v. Kovacs*, 105 S. Ct. 705 (1985) [hereinafter cited as Brief for the United States]. For background and discussion of the *Kovacs* case, see *infra* notes 153-72 and 210-68 and accompanying text. In addition to the United States, thirty states submitted or joined in *amicus* briefs in support of the state of Ohio. *Bankruptcy Held a Polluter Shield*, N.Y. Times, Jan. 10, 1985, I, at 17, col. 1.

<sup>13</sup> Pub. L. No. 95-598 § 101, 92 Stat. 2549 (1978) (codified in scattered sections of 11 U.S.C. (Supp. V 1984)).

<sup>14</sup> H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1979 U.S. CODE CONG. & AD. NEWS 5963, 6297 [hereinafter cited as HOUSE REPORT]. In this case, Congress was describing the automatic stay provision for bankruptcy relief, discussed *infra* at notes 70-112 and accompanying text.

<sup>15</sup> For instance, the goals of CERCLA have been summarized this way:

First, Congress intended that the federal government be immediately given the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal. Second, Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created.

*Reilly Tar & Chem. Corp.*, 546 F. Supp. at 1112.

given relief under the Bankruptcy Act at the expense of the goal of strict environmental accountability. The crux of the problem lies not so much in determining who will pay, but rather in deciding what sorts of debts to society we intend to excuse through the operation and availability of the bankruptcy laws.

This article examines the clash between environmental enforcement and the bankruptcy laws that arises when governments attempt to enforce environmental injunctions against parties in bankruptcy. Section I discusses environmental injunctions and their use in state and federal enforcement actions.<sup>16</sup> Section II discusses the Bankruptcy Reform Act and its automatic stay<sup>17</sup> and discharge<sup>18</sup> provisions.<sup>19</sup> This section concludes that, through the statutory exceptions to the automatic stay provision, Congress intended to give governments wide latitude in enforcing both their environmental laws, and the injunctive remedies that result. Section II also concludes that although Congress did not clearly exempt injunctive judgments from the ultimate relief of discharge, the language of the Act permits courts to find that when bankruptcy proceedings are concluded, a party should continue to bear responsibility for the costs of cleaning up hazardous wastes and other dangerous pollutants. Section III examines recent case law on the applicability of both the automatic stay and the discharge provision to the enforcement of environmental injunctions.<sup>20</sup> The article concludes that, if the federal and state governments want to ensure that the provisions of the Bankruptcy Code do not shelter polluters, they must treat those polluters like criminals.

## I. ENVIRONMENTAL ENFORCEMENT INJUNCTIONS

The injunction is a judicial order to a party requiring them to take, or to refrain from taking, certain actions.<sup>21</sup> It is an unusual remedy, and is reserved for situations when no other adequate legal remedies exist.<sup>22</sup> Both mandatory injunctions (requiring action) and prohibi-

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<sup>16</sup> See *infra* 21-41 and accompanying text.

<sup>17</sup> 11 U.S.C. § 362 (Supp. II 1984).

<sup>18</sup> *Id.* § 727.

<sup>19</sup> See *infra* notes 42-147 and accompanying text.

<sup>20</sup> See *infra* notes 148-268 and accompanying text.

<sup>21</sup> 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2941 (1973) [hereinafter cited as WRIGHT & MILLER].

<sup>22</sup> *Id.* § 2942. A remedy is adequate when it gives full relief to a party. Legal remedies include money damages, which would be adequate if they compensated a party for losses

tory injunctions (restraining action) may be issued prior to a trial on the merits; these "preliminary injunctions" are used when the action or restraint of action is required to prevent an irreparable injury from occurring.<sup>23</sup> Injunctive relief is available both under statutory provisions,<sup>24</sup> and as part of courts' common law "equitable jurisdiction."<sup>25</sup> Injunctions are frequently a proper remedy for the protection of the rights or welfare of the public, and are particularly appropriate in environmental enforcement in order to "protect a large public from the rippling and impalpable effects of violations" of environmental laws.<sup>26</sup>

States and the federal government use injunctions and other equitable remedies to aid them in enforcing their environmental laws.<sup>27</sup> In environmental regulatory laws enacted between 1967 and 1980, Congress granted to federal officials the authority to seek equitable relief, including injunctions, in cases of "imminent and substantial endangerment" to persons or the environment.<sup>28</sup> States seeking injunctions rely primarily on the equity power of their courts to aid

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sustained. Remedies are inadequate if: (1) a money award is speculative because damages are uncertain; (2) injuries will continue; (3) damages are not adequate to compensate; and (4) irreparable harm will occur (generally to the plaintiff) without the injunction and for which harm money damages will not compensate. *Id.* § 2944.

<sup>23</sup> *Id.* § 2948.

<sup>24</sup> See, e.g., the abatement authority of CERCLA, 42 U.S.C. § 9606(a) (1982). This section permits the federal government to seek necessary relief from a district court, which in turn is empowered specifically to grant "such relief as the public interest and the equities of the case may require." *Id.* Actions under this section have included suits seeking preliminary injunctions to force cleanups. See, e.g., *United States v. Northeastern Pharmaceutical and Chem. Co.*, 579 F. Supp. 823 (W.D. Mo. 1984).

<sup>25</sup> Modern courts possess merged powers of law and equity, but certain powers of a court, such as the power to issue and enforce injunctions, are considered part of the equity power of the court, which enables the court to "do justice" when the law and other legal remedies fail to do so. See Winner, *The Chancellor's Foot and Environmental Law: A Call for Better Reasoned Decisions on Environmental Injunctions*, 9 ENVTL. L. 477, 479-84 (1979).

<sup>26</sup> Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 562 (1978) [hereinafter cited as *Preliminary Injunctions*].

<sup>27</sup> See, e.g., *United States v. Price*, 688 F.2d 204 (3d Cir. 1982) (U.S. sought preliminary injunction under CERCLA and RCRA provisions).

<sup>28</sup> Imminent hazard provisions appear at section 1431 of the Safe Water Drinking Act, 42 U.S.C. § 300i(a) (1976); section 504(A) of the Clean Water Act, 33 U.S.C. § 1364(a) (Supp. V 1981); section 303 of the Clean Air Act, 42 U.S.C. § 7603(a) (Supp. V 1981); section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973 (1976); section 8 of the Toxic Substances Control Act, 15 U.S.C. § 2606(b) (1982); and section 106 of CERCLA, 42 U.S.C. § 9606(a) (Supp. V 1981).

One commentator suggests that the equitable power granted by these statutes might extend to allow courts to use remedies such as environmental restoration orders. Note, *Environmental Restoration Orders*, 12 B.C. ENVTL. AFF. L. REV. 171, 197-203 (1985).

them in enforcement of their environmental laws when public health or the environment may be threatened.<sup>29</sup>

Environmental law enforcers have made particular use of the mandatory preliminary injunction to require parties to clean up hazardous substances and pollution. Traditionally, the mandatory injunction was viewed as an "extraordinary" remedy because the court imposed a duty of its own making, and as a result, became part of the enforcement process.<sup>30</sup> However, the use of mandatory preliminary injunctions is now considered appropriate when active pollution conditions, "if allowed to continue or proceed unchecked and unrestrained, will inflict serious irreparable injury."<sup>31</sup> Improper disposal of hazardous waste presents just such a threat in many cases; for instance, hazardous chemicals dumped on the ground, if not cleared up, may leach through soil and into groundwater supplies, or may drain into streams and lakes. The presence of such threats explains why government actions to seek such injunctions have in some cases been favorably received by courts.<sup>32</sup>

A mandatory injunction often requires the expenditure of money or resources by a defendant because it imposes on them an affirmative duty to perform certain acts. Injunctions to clean up pollution that presents a potential health risk represents a responsibility that the state or federal government will generally assume if the responsible party fails or is unable to assume it.<sup>33</sup> The injunction thus allocates cleanup costs from the government to the legally responsible parties.

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<sup>29</sup> See, e.g., *Penn Terra Ltd. v. Dept. of Env'tl. Resources*, 733 F.2d 267, 275 (3d Cir. 1984) (injunction sought to secure cleanup of mining sites threatening water resources).

<sup>30</sup> WRIGHT & MILLER, *supra* note 21, at § 2942. Authorities who have studied the supposed reluctance of courts to issue mandatory injunctions, however, note that the courts have used them "whenever the circumstances warrant[ed]." *Id.* The rule against mandatory injunctions is criticized as a formulaic way to avoid a decision on the merits of a preliminary injunction, namely relative burdens on the parties. See Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1063 (1965) [hereinafter cited as *Developments*].

<sup>31</sup> *United States v. Price*, 688 F.2d 204, 212 (3d Cir. 1982).

<sup>32</sup> See, e.g., *Penn Terra Ltd. v. Dept. of Env'tl. Resources*, 733 F.2d 267 (3d Cir. 1984).

<sup>33</sup> The governmental obligation arises under laws such as CERCLA and state "Superfund" laws. See *supra* note 5. CERCLA also permits the EPA to issue administrative orders to parties who are "potentially liable" for cleanup at hazardous waste sites. 42 U.S.C. § 9606 (Supp. V 1981). EPA may seek injunctions to enforce the orders, and also is authorized to assess penalties against parties who refuse to comply. *Id.* § 9607(c). However, the EPA's ability to assess such penalties prior to a hearing was successfully challenged by a potentially responsible party. See *Aminoil Inc. v. EPA*, 21 ENV'T REP. CAS. (BNA) 1817 (C.D. Cal., Sept. 28, 1984).

When a government seeks a preliminary injunction in the case of an alleged or proved violation of environmental laws it must convince the court that the interests served by the issuance of the injunction, such as the protection of a water supply or of the health of nearby residents, outweigh the interests of the party against whom the injunction is sought. In issuing a preliminary injunction, courts look at four factors to balance the interests involved:

- (1) the probability of irreparable injury to the moving party in the absence of relief; (2) the possibility of harm to the non-moving party if relief is granted; (3) the likelihood of success on the merits; and (4) the public interest.<sup>34</sup>

When preliminary injunctive relief is sought under statutory authority, courts do not always require a showing of irreparable injury.<sup>35</sup> Once an injunction has been imposed, failure to comply can be punished by an action for contempt of court.<sup>36</sup> Alternatively, if a party fails to comply with a mandatory injunction, the court may impose a receivership to force the party to comply.<sup>37</sup> Where receiverships are imposed to enforce an injunction, the court appoints a third party receiver to take over the property or assets of the party who has failed to comply with the injunction and to manage those assets until compliance is reached.<sup>38</sup> The receivership, like the underlying injunction, is equitable in nature, and in some cases receiv-

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<sup>34</sup> U.S. v. Price, 688 F.2d 204, 211 (3d Cir. 1982) (citing Goldhaber v. Foley, 519 F. Supp. 466, 473 (E.D. Pa. 1981)).

<sup>35</sup> WRIGHT & MILLER, *supra* note 21, at § 2948. One commentator criticizes this approach, on the grounds that it creates an irrebuttable presumption of irreparable injury when such injury may not actually be present. He would require the balancing of the factors in the case of all injunctions. See *Preliminary Injunctions*, *supra* note 26, at 561-62. The federal environmental enforcement laws have created a new standard for the issuance of injunctions and other equitable relief; such remedies are permitted when there *may* be an "imminent and substantial endangerment" to the public health or the environment. See, e.g., 42 U.S.C. § 9606(a) (Supp. V 1981). This standard has been interpreted as "more lenient than the traditional requirement of threatened irreparable harm." *Price*, 688 F.2d at 211.

<sup>36</sup> Contempt is an act of disobedience or disrespect to a judicial body. Note, *Contempt and the Automatic Stay*, 6 CARDOZO L. REV. 177, 179 (1984). Courts distinguish between civil and criminal contempt. Criminal contempt vindicates the court's authority, while civil contempt proceedings are used to compel obedience to the court's order or to get some substitute relief for the benefit of the opposing party. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 235 (1971).

<sup>37</sup> Receiverships have been used to enforce injunctions in cases where the injunction involved property. *Developments*, *supra* note 30, at 1092.

<sup>38</sup> See *United States v. City of Detroit*, 476 F. Supp. 512, 520 (E.D. Mich. 1979).



erships are considered to be equivalent to mandatory injunctions.<sup>39</sup> The receivership is the remedy of last resort, only used when all other remedies, including injunctions, have been tried.<sup>40</sup> Receiverships are appropriate tools in the enforcement of environmental laws "particularly in aid of an outstanding injunction" when "[t]he more usual remedies — contempt proceedings and further injunctions — [are] plainly not very promising as they [invite] further confrontation and delay."<sup>41</sup>

In light of the automatic stay and discharge provisions of the Bankruptcy Act, which govern the conduct of legal action and the ultimate status of legal obligations imposed against parties who declare bankruptcy, the use of injunctions and, when necessary, receiverships, to enforce environmental laws against bankrupt parties is controversial. This controversy has given rise to litigation that has produced conflicting interpretations of the propriety of such governmental enforcement. To better understand this controversy, the following section examines the applicable provisions of the Bankruptcy Act.

## II. THE BANKRUPTCY REFORM ACT

The Bankruptcy Reform Act<sup>42</sup> was enacted in 1978. The Act, commonly referred to as the Bankruptcy Code (the Code) represented the first overhaul of the federal bankruptcy system in over forty years: it revised both the substantive law of bankruptcy,<sup>43</sup> and

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<sup>39</sup> I. CLARK, *THE LAW AND PRACTICE OF RECEIVERS*, § 58 (1959) [hereinafter cited as *RECEIVERS*]; see also Note, *Receivership as a Remedy in Civil Rights Cases*, 24 *RUTGERS L. REV.* 115, 132-42 (1969).

<sup>40</sup> *RECEIVERS*, *supra* note 39, at § 59; see *Bracco v. Lackner*, 462 F. Supp. 436, 456 (N.D. Cal. 1978).

<sup>41</sup> *City of Detroit*, 476 F. Supp. at 520 (quoting *Morgan v. McDonough*, 540 F.2d 527, 533 (1st Cir. 1976)). See also *Ohio v. Kovacs*, 105 S. Ct. 705 (1985) (state of Ohio obtained appointment of receiver to assure compliance with environmental laws). See *infra* notes 153-72 and 210-68 and accompanying text.

<sup>42</sup> The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified at 11 U.S.C., in scattered sections of 28 U.S.C. and in scattered sections of other titles (1982)).

<sup>43</sup> Changes in the substantive law are codified at 11 U.S.C. § 101 (1982). The bankruptcy law is divided into eight chapters, three of which set forth definitions common to all bankruptcies: Chapter 1: General Provisions, *id.* §§ 101-109; Chapter 3: Case Administration, *id.* §§ 301-366; and Chapter 5: Creditors, The Debtor and The Estate, *id.* §§ 501-556. The Act also includes Chapter 13, which allows individuals not in a business to restructure and pay off most debts. *Id.* §§ 1301-1330.

the bankruptcy court system,<sup>44</sup> in an attempt to respond to the growing number of bankruptcies.<sup>45</sup>

Individuals and businesses who are subject to environmental enforcement laws and who incur debts that exceed their capacity to pay may be involved in one of two types of bankruptcy proceeding: liquidation<sup>46</sup> or reorganization.<sup>47</sup> When an individual or business debtor files for a Chapter 7<sup>48</sup> liquidation, or "straight," bankruptcy, a trustee is appointed by the bankruptcy court to administer the debtor's assets, which are known as the estate. The trustee liquidates the debtor's non-exempt<sup>49</sup> assets and distributes them to the creditors of the debtor.<sup>50</sup> Upon completion of liquidation, a debtor is

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<sup>44</sup> Changes in the bankruptcy court system are codified in scattered sections of 28 U.S.C. (1982 & Supp. I 1984). The broad grant of jurisdiction to the newly structured bankruptcy courts was brought into question in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), in which the Court found that the jurisdictional grant violated the United States Constitution. See Casenote, *Northern Pipeline Construction Co. v. Marathon Pipeline Co.: The Broad Jurisdiction Granted to the Bankruptcy Courts by the Bankruptcy Reform Act of 1978 is Invalidated*, 24 S. TEX. L.J. 317 (1983).

<sup>45</sup> The Bankruptcy Reform Act repealed the Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, and was enacted to modernize bankruptcy law. S. REP. NO. 989, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787 [hereinafter cited as SENATE REPORT]. The most recent revision of the bankruptcy law had occurred in 1938; since that time vast changes including "steady growth in the number of bankruptcies, both consumer and . . . business reorganization[s] . . . [had] led to great stresses and strains in the bankruptcy system." *Id.* at 5788-89. A study commission was appointed in 1970, which filed its final report including a draft bill in 1973. Hearings commenced in 1975. *Id.* at 5787-88.

The passage of the Bankruptcy Reform Act is detailed in two articles by participants in the process. See Butler, *A Congressman's Reflections on the Drafting of the Bankruptcy Code of 1978*, 21 WM. & MARY L. REV. 557 (1980); Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941 (1979).

<sup>46</sup> Statutory provisions regarding liquidations appear in Chapter 7 of the Code, 11 U.S.C. §§ 701-766 (1982). For a detailed explanation of the liquidation provisions, see Rendleman, *Liquidation Bankruptcy Under the '78 Code*, 21 WM. & MARY L. REV. 575 (1980); Aaron, *The Bankruptcy Reform Act of 1978: The Full-Employment-for-Lawyers Bill-Part III: Business Bankruptcy*, 1979 UTAH L. REV. 405.

<sup>47</sup> Reorganization is detailed in Chapter 11, 11 U.S.C. §§ 1101-1174 (1982). Perhaps the most important accomplishment of the 1978 Code was the consolidation of the three reorganization chapters (formerly X, XI and XII) into a single Chapter 11. SENATE REPORT, *supra* note 45, at 9, reprinted at 5795. See Aaron, *The Bankruptcy Reform Act of 1978: The Full Employment for Lawyers Bill-Part I: Overview and Legislative History*, 1979 UTAH L. REV. 1, 16-17.

<sup>48</sup> 11 U.S.C. §§ 521(3), 701, 702 (1982).

<sup>49</sup> 11 U.S.C. § 522 (1982). Exempt assets include those items the individual debtor needs for the "fresh start." See SENATE REPORT, *supra* note 45, reprinted at 5793. None of the property of business debtors can be claimed as exempt. 11 U.S.C. § 522(b) (1982).

<sup>50</sup> Only parties who have allowable "claims" may seek to share in distribution of assets. 11 U.S.C. §§ 502(a)-(b) and 726(a) (1982). Distribution is made according to priority system. *Id.* § 726. See *infra* notes 59-66 and accompanying text.

granted a discharge,<sup>51</sup> or forgiveness, of debts, despite the fact that the creditors may not have received complete payment out of the liquidation proceeds.<sup>52</sup> However, discharge is not available to all debtors,<sup>53</sup> and certain debts are exempted from discharge by the statute.<sup>54</sup>

By contrast, the reorganization option of Chapter 11,<sup>55</sup> is used primarily by corporate business debtors who usually act as their own trustee. The purpose of a reorganization is to restructure the business's debt so that it may continue to operate.<sup>56</sup> Reorganization proceeds according to a reorganization plan, formulated by the debtor and its creditors,<sup>57</sup> and a discharge of obligations follows affirmation of the plan by the court.<sup>58</sup>

Both the reorganization and liquidation sections of the Code provide a system of priorities for the payment (in liquidation) or restructuring (in reorganization) of debt out of the limited assets of the debtor's estate. For example, in liquidations, secured debts<sup>59</sup> are honored first, and then administrative expenses,<sup>60</sup> and then other priority claims.<sup>61</sup> Generally, unsecured creditors,<sup>62</sup> a classification

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<sup>51</sup> 11 U.S.C. § 727 (1982).

<sup>52</sup> *Id.* § 727(b).

<sup>53</sup> *Id.* § 727(a). See *infra* notes 120-29 and accompanying text. Corporate debtors are denied Chapter 7 discharge. 11 U.S.C. § 727(a)(1) (1982). The legislative history suggests that this denial of discharge is to discourage parties from trafficking in corporate shells, a form of bankruptcy fraud. See SENATE REPORT, *supra* note 45, at 7, reprinted at 5793. However, some courts have opined that this exemption is merely the recognition that the discharge of a corporate debtor is a meaningless gesture, since with the distribution of the corporation, in liquidation, no party remains to satisfy debts. See, e.g., *In re Thomas Solvent Co.*, 44 Bankr. 83, 86 (Bankr. W.D. Mich. 1984); see also Hennigan, *Accommodating Regulatory Enforcement and Bankruptcy Protection*, 59 AM. BANKR. L.J. 1, 6 (1985) [hereinafter cited as *Bankruptcy Protection*].

<sup>54</sup> 11 U.S.C. § 523 (1982).

<sup>55</sup> In these cases, the business becomes a debtor-in-possession and continues to operate whenever and to whatever extent possible. *Id.* § 107. This was done by the Manville Corporation in the controversial Johns-Manville bankruptcy. See Comment, *Environmental Protection and Bankruptcy Rehabilitation: Toward a Better Compromise*, 11 ECOLOGY L.Q. 671, 673-87 (1984) [hereinafter cited as *Environmental Protection*].

<sup>56</sup> HOUSE REPORT, *supra* note 14, at 220, reprinted at 6179.

<sup>57</sup> 11 U.S.C. §§ 1121-1129 (1982).

<sup>58</sup> *Id.* §§ 1122-1123, 1141. Most of the controversies that have so far arisen in the enforcement of environmental laws against debtors concern liquidation bankruptcies. It is beyond the scope of this comment to address the numerous issues raised in the reorganization context. For a treatment of some of these issues, see *Environmental Protection*, *supra* note 55.

<sup>59</sup> 11 U.S.C. §§ 506(a), 725 (1982).

<sup>60</sup> *Id.* § 507(a)(1). Some governments have sought to recover debts from environmental violators by claiming they are administrative expenses. See Drabkin, Moorman, & Kirsch, *Bankruptcy and the Cleanup of Hazardous Waste: Caveat Creditor*, 15 ENVTL. L. REP. (ENVTL. L. INST.) 10168, 10177-79 (June 1985) [hereinafter cited as *Caveat Creditor*].

<sup>61</sup> 11 U.S.C. § 507(a) (1982).

<sup>62</sup> *Id.* § 726(a), (b).

which includes government claims, stand at the end of the line.<sup>63</sup> Since there is no assurance that even priority creditors will be satisfied out of the debtor's limited estate, it is unlikely that government claims, such as those for environmental cleanup expenditures incurred by government and for which the debtor is liable, will be satisfied.

State governments can improve their chances for satisfaction of claims in the priority system by classifying certain debts owed to them as first priority claims, a classification that the bankruptcy court, in theory, will honor.<sup>64</sup> Three states have enacted laws to create such a priority for environmental cleanup claims;<sup>65</sup> however, the other states have not, so the great bulk of environmental cleanup debts will continue to occupy a low priority slot and thus will rarely be satisfied.<sup>66</sup>

The filing of any bankruptcy petition<sup>67</sup> triggers the automatic stay provision of the Code<sup>68</sup> so that all actions or proceedings against the debtor, including most legal proceedings and collection actions, are immediately halted.<sup>69</sup> The next section of this article examines the automatic stay provision, its legislative history, and a related code provision in light of the controversy over enforcing injunctions against parties in bankruptcy.

### A. *The Automatic Stay Provision: Section 362*

First codified in the 1978 Act,<sup>70</sup> the stay offers protection for both debtor and creditors,<sup>71</sup> as well as an aid to the administration of the

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<sup>63</sup> See HOUSE REPORT, *supra* note 14, at 193, reprinted at 6154. The U.S. government does enjoy a priority for federal income tax claims, 11 U.S.C. § 507(a) (1982), and there are other government-related exceptions to discharge. *Id.* § 523; see *infra* text and notes at notes 131-35.

<sup>64</sup> State law determines the property rights in the assets of a bankrupt's estate. *Butner v. United States*, 440 U.S. 48, 54 (1979); see *Ohio v. Kovacs*, 105 S. Ct. 705, 712 (1985) (O'Connor, J., concurring).

<sup>65</sup> The states have created such priority for their environmental claims by imposing a lien status on them. See *Caveat Creditor*, *supra* note 60, at 179-80. As these commentators point out, these laws raise problems of notice and fairness to other creditors. A member of Congress unsuccessfully sought to impose a similar lien status on CERCLA claims. See Lockett, *Environmental Liability Enforcement and the Bankruptcy Act of 1978: A Study of H.R. 2767, the "Superlien" Provision*, 19 REAL PROP. PROB. & TR. J. 859 (1984).

<sup>66</sup> See *supra* note 10.

<sup>67</sup> Bankruptcy petitions may be either voluntarily filed by debtors, 11 U.S.C. § 301 (1982), or filed by creditors, *id.* § 303.

<sup>68</sup> 11 U.S.C. § 362 (1982).

<sup>69</sup> *Id.* §§ 362(a)(1)-(8).

<sup>70</sup> Under prior law, the stay provisions were judicially developed, and codified in a piecemeal fashion in the Bankruptcy Procedural Rules. The stay provision is currently codified in Title 3, the "Administrative Powers" section of the Act. For a detailed study of the stay provision

bankruptcy by the court and the bankruptcy trustees. The stay is a fundamental debtor protection because it provides a "breathing spell" for the debtor from creditor harassment and relieves the concerns that caused the bankruptcy.<sup>72</sup> The stay also protects the interests of creditors by staying collection activities so that the interests of all creditors are protected against the predatory actions of a few.<sup>73</sup>

The stay automatically goes into effect when the debtor's bankruptcy petition is filed.<sup>74</sup> The stay is applicable to "all entities," including governmental units,<sup>75</sup> who initiate legal proceedings or collection efforts on the basis of the debtor's pre-filing activity.<sup>76</sup> The filing of the petition, however, does not stay all proceedings.<sup>77</sup> In particular, government enforcement of regulatory laws, such as environmental protection laws, is specifically permitted to proceed under two interrelated exceptions to the automatic stay. The stay normally operates to stop judicial, administrative or other proceedings against the debtor that were or could have been commenced before the filing.<sup>78</sup> Section 362(b)(4), however, excepts "an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power."<sup>79</sup> Section 362(b)(5) excepts "enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power" from the otherwise applicable stay of the enforcement<sup>80</sup> against the debtor or his prop-

under the old and new bankruptcy laws, see Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH. J.L. REF. 175 (1978); Kennedy, *Automatic Stays under the New Bankruptcy Laws*, 12 U. MICH. J.L. REF. 3 (1978) [hereinafter cited as *Automatic Stay II*].

<sup>71</sup> See HOUSE REPORT, *supra* note 14, at 340, reprinted at 6296-97.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*, reprinted at 6297.

<sup>74</sup> 11 U.S.C. § 362 (1982).

<sup>75</sup> *Id.* § 362(a), which states that "this title . . . operates as a stay, applicable to all entities . . . ." The entities include governmental units. *Id.* § 101(14). The legislative history also clarifies this point:

[w]ith respect to . . . the application of the automatic stay, to governmental actions, this section . . . [is] intended to be an express waiver of sovereign immunity of the Federal government, and an assertion of the bankruptcy power over State governments under the Supremacy Clause notwithstanding a State's sovereign immunity.

SENATE REPORT, *supra* note 45, at 51, reprinted at 6299.

<sup>76</sup> The stay provision lists eight categories of proceedings or actions to which it applies. 11 U.S.C. §§ 362(a)(1)-(8) (1982).

<sup>77</sup> The exceptions to the automatic stay are listed in 11 U.S.C. §§ 362(b)(1)-(8) (1982).

<sup>78</sup> *Id.* § 362(a)(1).

<sup>79</sup> *Id.* § 362(b)(4).

<sup>80</sup> *Id.* § 362(a)(1).

erty of judgments obtained before filing.<sup>81</sup> Thus, section 362(b)(4) is directed at civil actions<sup>82</sup> that have been or could be commenced against a debtor, while section 362(b)(5) is directed at judgments or outstanding final orders entered against a debtor in proceedings that have concluded before the bankruptcy petition was filed. These two exceptions are generally read and interpreted together<sup>83</sup> to constitute the "government enforcement exceptions." The exceptions indicate a legislative intent that the stay was not to act as an impediment to law enforcement actions.<sup>84</sup> The legislative history of the Act supports this conclusion by illuminating Congress' purpose in providing these exceptions, and shows why section 105 of the Bankruptcy Act, which defines the powers of the court, helps to clarify the scope and purpose of the stay provision and its exceptions. The following sections examine the legislative history of both the automatic stay exceptions and of section 105.

#### 1. Legislative History of the Exceptions to the Automatic Stay Provision

The legislative history of the automatic stay exceptions supports a conclusion that Congress intended that governmental actions to enforce environmental regulations, especially those protecting the public health and safety, were to proceed unimpeded under these exceptions.<sup>85</sup> In early hearings regarding the proposed Bankruptcy

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<sup>81</sup> *Id.* § 362(a)(2). This section of the stay halts the enforcement of judgments obtained before the bankruptcy filing and does not mention judgments that might be obtained after the filing. One commentator has concluded that Congress intended that section 362(a)(2) be consistent with section 362(a)(1), which stays all actions that were or could have been commenced before filing, and that thus section 362(a)(2) would apply to any judgments that result from pre-petition causes of action. *Automatic Stay II*, *supra* note 70, at 14. At least one court has disagreed with this conclusion. See *Department of Env'tl. Resources v. Peggs Run Coal Co.*, 423 A.2d 765, 767 (Pa. Commw. Ct. 1980).

<sup>82</sup> Criminal actions are not stayed. 11 U.S.C. § 362(b)(1) (1982).

<sup>83</sup> In comments on the interpretation to be given to the relationship between sections 362(b)(4) and 362(b)(5), Professor Kennedy reads the sections together, as "render[ing] the automatic stay inoperative against any governmental unit enforcing its police or regulatory power otherwise than by collecting a money judgment." *Automatic Stay II*, *supra* note 70, at 27. Professor Aaron interprets § 362(b)(5) as limiting enforcement of governmental agency judgments to those "which do not involve money recovery." Aaron, *Bankruptcy Stays of Environmental Regulation: Harvest of Commercial Timber as an Introduction to a Clash of Policies*, 12 ENVTL. L. 1, 8 (1981).

<sup>84</sup> This conclusion is reinforced by the first exception to the stay, which excepts the continuation or commencement of a criminal action or proceeding against the debtor. 11 U.S.C. § 362(b)(1) (1982).

<sup>85</sup> Legislative intent as revealed through congressional reports and the *Congressional Record* is an important element in the development, application and interpretation of many federal

Act, the House Judiciary Committee expressed concern with prior "overuse" of the stay "in the area of governmental regulation."<sup>86</sup> The committee's report cited one bankruptcy court action under the predecessor to the present stay provision in which a bankruptcy court prevented a state from closing a debtor's plant that was illegally polluting a river.<sup>87</sup> The committee report states that the new bill "excepts [this] kind[s] of action[s] from the automatic stay."<sup>88</sup>

A later section of the same House Report<sup>89</sup> reaffirms this congressional concern that the stay not hamper enforcement of environmental regulatory laws. Discussing the section 362(b)(4) exception that allows police or regulatory enforcement actions to continue, the report states that among the police and regulatory actions that may proceed despite the stay are suits "to prevent or stop violation of . . . environmental protection . . . laws" and suits "attempting to fix damages for violation of such law[s]."<sup>90</sup>

This report also gives explicit support for the entry and enforcement of injunctive remedies. It states that section 362(b)(5), which permits enforcement of all pre-filing judgments except money judgments, "makes clear that the [governmental] exception extends to permit an injunction and the enforcement of an injunction . . . ."<sup>91</sup>

In addition, the floor statements by the House and Senate managers of the bill that are the final statement of the congressional

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statutes. See Note, *The Congressional Record and the First Amendment: Accuracy is the Best Policy*, 12 B.C. ENVTL. AFF. L. REV. 341, 342 (1985).

<sup>86</sup> HOUSE REPORT, *supra* note 14, reprinted at 6135.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* One commentator finds in the congressional reports a clear legislative intent to permit the stay exceptions of §§ 362(b)(4) and (5) to "overrule decisions applying the automatic stay to proceedings to enforce state environmental control laws." *Automatic Stay II*, *supra* note 70, at 11.

<sup>89</sup> HOUSE REPORT, *supra* note 14, reprinted at 6299.

<sup>90</sup> *Id.* Identical language appears in the SENATE REPORT, *supra* note 45, reprinted at 5840. The reports also state that actions arising from laws regarding fraud, . . . consumer protection, safety, or "similar police or regulatory laws" were not to be stayed automatically. *Id.*

<sup>91</sup> HOUSE REPORT, *supra* note 14, reprinted at 6299; SENATE REPORT, *supra* note 45, reprinted at 5838. Some commentators have interpreted this congressional language and the language of § 362(b)(5) as permitting governments to enforce only injunctions of the ongoing practices of a debtor, but not injunctions that were entered for pre-petition actions. See Bankruptcy Protection, *supra* note 53, at 21-23; see also Baird & Jackson, *Kovacs and Toxic Wastes in Bankruptcy*, 36 STAN. L. REV. 1199, 1199-1200, n.3 (1984). Neither the statute nor the legislative history differentiates among the various kinds of injunctions as to which are enforceable. Congress was no doubt aware of the costly effect of injunctions such as those available in environmental legislation it had passed. See, e.g., 42 U.S.C. § 6973 (1976) (RCRA injunctive remedy section).

interpretation of the statutory language,<sup>92</sup> indicate that the automatic stay was not intended to prevent enforcement against debtors of environmental regulations. These statements assert that the section 362(b)(4) exception for governmental enforcement actions against the debtor should be construed "to permit governmental units to pursue actions to protect the public health and safety . . . ."<sup>93</sup>

These legislative statements, read together with the plain language of the sections 362(b)(4) and (b)(5) exceptions to the stay provision, indicate that Congress intended that environmental regulations designed to protect public health and safety be enforceable against a debtor in bankruptcy, both through the continuation, or the commencement of legal proceedings, as well as through enforcement of injunctive remedies.

Although congressional intent to permit enforcement in spite of the stay is clear, Congress also expressed a desire to limit this enforcement authority in some cases. In particular, Congress was concerned that governmental units might gain a favored position as creditors while acting under the umbrella of their enforcement powers. The most cogent expression of this concern is the statutory provision in the section 362(b)(5) exception that enforcement of money judgments will be subject to the automatic stay provision. The legislative report specifically states that section 362(b)(5):

extends to permit an injunction and the enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.<sup>94</sup>

Congress extended this prohibition against predatory creditor actions by limiting the section 362(b)(4) exception. The floor statements that expressed support for actions to protect health and safety also

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<sup>92</sup> 124 CONG. REC. H. 11,089 (daily ed. Sept. 28, 1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 6436 (statement of Rep. Edwards) [hereinafter cited as FLOOR STATEMENTS]. The identical statement of the Senate manager of the bill is found at 124 CONG. REC. 517,409 (daily ed. Oct. 6, 1978) *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6513 (statement of Sen. DiConcini).

<sup>93</sup> FLOOR STATEMENTS, *supra* note 92, at 6444-6445.

<sup>94</sup> HOUSE REPORT, *supra* note 14, *reprinted at* 6299.



urge a narrow construction of section 362(b)(4), which is the provision exempting proceedings to enforce police or regulatory laws from the automatic stay provision. These statements assert that the section 362(b)(4) exception should not apply to actions that "protect a pecuniary interest in the property of a debtor."<sup>95</sup>

Thus, governmental units enjoy a broad exception from the stay provision to protect their citizens through enforcement actions, but, like other creditors, are prohibited under section 362(b)(5) from pursuing the collection of money judgments. However, while Congress clearly intended to prohibit enforcement of money judgments, it clearly permitted the entry of money judgments, and both the entry and enforcement of injunctions,<sup>96</sup> even in the face of the possibility of harm to other creditors.

An interpretation dispute regarding the scope of the stay exceptions as set forth in the act, and as illuminated by the relevant legislative history, arises when a governmental enforcement action, legitimately pursued against a debtor to protect public health and safety, imposes a cost on the debtor. The controversy arises in cases involving actions to enforce costly judgments.<sup>97</sup> Actions to enforce money judgments, such as compensatory damages claims, clearly fall within the limitation placed in the section 362(b)(5) exception, and thus an action to enforce that judgment ordinarily would be stayed. An environmental injunction prohibiting the debtor from continuing an action, or imposing upon him a mandatory duty to perform a cleanup, could impose a cost or loss of profits equal to the money paid out in compensatory damages. Yet, the statutory language of the exception allows both the entry and the enforcement of injunctive remedies, and the legislative history supports this straightforward conclusion. Therefore, such an injunction appears to be enforceable under the stay exception of section 362(b)(5).

Additional relevant language in the legislative history supports this reading. It suggests that because the bankruptcy court has power to halt all actions, including those excepted from the automatic stay, to serve the goals of the bankruptcy laws when necessary, the exceptions to the stay should be broadly construed. That power is granted in section 105 of the Act, which is discussed in the following section.

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<sup>95</sup> FLOOR STATEMENTS, *supra* note 92.

<sup>96</sup> See *supra* notes 91-93 and accompanying text.

<sup>97</sup> For discussion of some of the cases involved in the controversy, see *infra* notes 148-268 and accompanying text.

## 2. Section 105: Clarifying the Scope of the Automatic Stay.

Section 105 of the Bankruptcy Act<sup>98</sup> allows the Bankruptcy Court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the title.”<sup>99</sup> These residual powers of the Bankruptcy Court serve to underscore the full range of actions that a bankruptcy court may take to make the bankruptcy process go more smoothly. While this section is not linked to the automatic stay, the legislative history of the Code reveals that the automatic stay provision and its exceptions must be read in conjunction with section 105 to understand what protection is available to the debtor after the bankruptcy petition is filed.<sup>100</sup>

The House and Senate Reports indicate that section 105 of the Act strengthens the debtor and creditor protections of the automatic stay provision by providing the district court or bankruptcy court in which a proceeding has been brought “ample other powers to stay actions not covered by the automatic stay” through its possession of “all the traditional injunctive powers of a court of equity.”<sup>101</sup> The reports make clear that, included among those powers, is the power to stay actions “enumerated in the exceptions [to the stay provisions], that generally should not be stayed automatically upon the commencement of the case, for reasons of *policy or practicality*.”<sup>102</sup>

This language indicates that section 105 permits the Bankruptcy Court to override the effect of the statutorily-provided exceptions and to impose a stay of its own. However, because those exceptions represent policy decisions by the legislature, they should be overridden only in exceptional circumstances. The legislative history underscores this point by making clear that a court’s ability to stay such actions depends on a “case-by-case [determination] whether a particular action which may be harming the estate should be stayed.”<sup>103</sup> The reports state that a stay or an injunction issued under section 105:

will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. By excepting an act or action from the automatic stay, the [Act] simply requires that the trustee move the court

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<sup>98</sup> 11 U.S.C. § 105 (1982).

<sup>99</sup> *Id.* § 105(a).

<sup>100</sup> SENATE REPORT, *supra* note 45, at 51, *reprinted at* 5837; HOUSE REPORT, *supra* note 14, at 342, *reprinted at* 6298.

<sup>101</sup> SENATE REPORT, *supra* note 45, at 51; *see also* HOUSE REPORT, *supra* note 14, at 342.

<sup>102</sup> SENATE REPORT, *supra* note 45, at 51; HOUSE REPORT, *supra* note 14, at 342.

<sup>103</sup> SENATE REPORT, *supra* note 45, at 51; *see also* HOUSE REPORT, *supra* note 14, at 342.

into action, rather than requiring the stayed party to request relief from the stay.<sup>104</sup>

Congress thus indicated that when an action, such as the enforcement of an environmental injunction, is excepted from the automatic stay, the trustee who has taken over the debtor's assets has the burden of convincing the court that the action should not go forward.<sup>105</sup> If actions require expenditure of money from the debtor's estate, then the the debtor's trustee must petition the court to enjoin the government from their enforcement. The court evaluates the propriety of allowing the action to go forward under the rules, or for issuing any preliminary injunction.<sup>106</sup> To meet the burden of demonstrating the need for a preliminary injunction against the government, the trustee must prove: 1) that the estate would suffer irreparable harm if the injunction is not granted;<sup>107</sup> 2) that on balance, the injuries to the estate will be greater than the injury to the government if the injunction is not granted; 3) that the debtor has a high probability of succeeding on the merits in his dispute with the government; and, 4) that the relief granted is not contrary to the public interest.<sup>108</sup> This is a far greater task than the mere filing of a petition that triggers the automatic stay.

Section 105 adds to the debtor protections of the Act by supplementing the stay provision. However, as the legislative history illustrates, this extra protection also allows courts to read the stay's exceptions broadly and inclusively. Section 105 thus permits enforcement actions to proceed under the exceptions to the stay provision because it grants the court power to stay actions that impose excessive burdens on the estate. Such a reading would allow the majority of governmental enforcement actions to proceed under the enforcement exceptions because they satisfy the "reasons of policy or practicality" under which those exceptions were enacted.

Congress intended to provide governments with sufficient enforcement powers to protect public health and safety and to prevent debtors from using bankruptcy's automatic stay protection as a "haven" from the law.<sup>109</sup> In addition, however, Congress sought to pro-

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<sup>104</sup> SENATE REPORT, *supra* note 45, at 51; HOUSE REPORT, *supra* note 14, at 342.

<sup>105</sup> A party seeking relief under § 105 must file a separate action with the court, and bears a heavy burden of persuasion to overcome the state interest asserted. *See In re Territo*, No. 83-0416, slip op. at 5 (Bankr. D. N.J. Sept. 26, 1984).

<sup>106</sup> These factors are discussed *supra* note 34 and accompanying text.

<sup>107</sup> Because the trustee, or debtor-in-possession, would bring this action, irreparable injury could be asserted on behalf of the estate and on behalf of creditors interested in the estate. 11 U.S.C. § 323(b) (1982).

<sup>108</sup> *See supra* note 34 and accompanying text.

<sup>109</sup> HOUSE REPORT, *supra* note 14, at 342.

tect debtors and their creditors from governmental enforcement power when the exercise of such power results in preferential debt collection, or when the considerations of fairness to creditors outweigh the benefits to the government and to the public from the continued enforcement. Preferential debt collection is halted by the automatic stay of enforcement of money damages in sections 362(a)(2) and (b)(5); the more complex balancing of benefits and burdens in the case of judgments that are not mere debt collection is accomplished through the preliminary injunction available in section 105.

The automatic stay thus was not intended to halt the large class of government enforcement proceedings that lie outside the scope of "enforcement of money damages." The language of the automatic stay exceptions, read in light of their legislative history and against the background of the injunctive powers granted to the bankruptcy courts under section 105, reveals that governmental authority to protect the health and safety of its citizens through enforcement proceedings, including costly injunctions when necessary, overrides the automatic stay provision activated upon a bankruptcy filing.

Persuading a court to allow an enforcement action to proceed under the exceptions to the automatic stay provision is, however, only the first obstacle the government must overcome. In the case of a Chapter 7 debtor, the government must also persuade the court that the judgment it has received against the debtor, to comply with or satisfy certain obligations, is not a judgment obligation that is dischargeable by the debtor. Governments have argued that the kind of obligation that should be enforceable within the automatic stay exceptions, namely, the injunction that requires debtor forbearance or action, also should not be an obligation that the debtor can escape through its discharge. To aid in understanding this argument, the following section of this article discusses the liquidation discharge provision of the Act,<sup>110</sup> and its related exceptions.<sup>111</sup> It then discusses the definition of "claim"<sup>112</sup> in the code that is the basis of an argument against the discharge of an injunction.

### *B. The Discharge Provision*

The discharge or forgiveness of indebtedness granted to a debtor upon completion of a liquidation frees the debtor from some of the

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<sup>110</sup> 11 U.S.C. § 727 (1982).

<sup>111</sup> *Id.* § 523.

<sup>112</sup> *Id.* § 101(4)(B).

debts incurred prior to the bankruptcy petition.<sup>113</sup> In a liquidation,<sup>114</sup> the debtor's trustee liquidates all non-exempt assets;<sup>115</sup> then satisfies as many of the debts as possible according to the priority scheme set forth in the Act.<sup>116</sup> Remaining debts are discharged unless they are exempted from discharge.<sup>117</sup> The discharge provision of the Act voids any judgment that had determined the debtor's personal liability for a debt unless exempt or satisfied in liquidation.<sup>118</sup> This provision also protects the debtor from any further actions to collect those debts.<sup>119</sup>

The bankruptcy code as a whole is the mechanism by which honest debtors, weighed down by financial obligations, may be unburdened of past debts and start fresh.<sup>120</sup> Congress considered discharge the "heart of the fresh start provisions" of the Act.<sup>121</sup> The discharge section allows any party in interest to challenge discharge.<sup>122</sup> Parties such as the government who challenge the discharge of a particular debt may claim that, either the debtor is ineligible for discharge because of his post-filing behavior, or that the debt itself is not the kind of obligation Congress intended to forgive. Congress requires a court to grant a discharge in a liquidation unless the debtor is ineligible as defined in the discharge provision.<sup>123</sup> The presumption in the law has been to broadly construe the discharge available to debtors in order to achieve its primary purpose of giving debtors a new life.<sup>124</sup>

Discharge is only available to individuals.<sup>125</sup> Individuals who have obstructed the administration of the bankruptcy proceeding through

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<sup>113</sup> *Id.* § 727. Discharge forgives only pre-petition debt.

<sup>114</sup> Reorganization under the Code also provides for a discharge of debts. In reorganization, debts are restructured to create a new set of obligations under a reorganization plan. 11 U.S.C. §§ 1121-23. Therefore, discharge of old debts is contingent on assumption of new, and usually much reduced, obligations. See *Environmental Protection*, *supra* note 55, at 673-75.

<sup>115</sup> 11 U.S.C. §§ 522(b), (d) (1982). See *supra* note 49.

<sup>116</sup> *Id.* § 726. See *supra* at notes 59-65 and accompanying text.

<sup>117</sup> *Id.* § 523.

<sup>118</sup> *Id.* § 524(a)(1).

<sup>119</sup> *Id.* § 524(a)(3).

<sup>120</sup> *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

<sup>121</sup> SENATE REPORT, *supra* note 45, at 7, reprinted at 5793.

<sup>122</sup> 11 U.S.C. § 727(c) (1982).

<sup>123</sup> HOUSE REPORT, *supra* note 14, at 384-85; SENATE REPORT, *supra* note 45, at 7, reprinted at 5793. See *supra* note 53.

<sup>124</sup> To reach this result, courts narrowly construe the exemptions to bankruptcy in favor of the debtor and against the creditor. See *In re Wade*, 43 Bankr. 976, 981-82 (Bankr. D. Colo. 1984).

<sup>125</sup> See *supra* note 53.

misfeasance<sup>126</sup> or fraud,<sup>127</sup> who have failed to supply information to the court or trustee,<sup>128</sup> or who have been granted a discharge in any bankruptcy proceeding in the six years prior to filing will be denied a discharge.<sup>129</sup>

The Code also statutorily exempts certain debts from discharge.<sup>130</sup> Debts not discharged<sup>131</sup> include debts resulting from credit obtained under falsehoods,<sup>132</sup> from certain criminal activities,<sup>133</sup> from willful and malicious injury,<sup>134</sup> and a debt that is a "fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."<sup>135</sup>

The obligation of a debtor to fulfill the terms of an injunction does not readily fit into any of the exemption categories. The injunction is most similar to the exempted fines, penalties or forfeitures because it is not compensation for actual pecuniary loss. An injunction, however, is imposed to correct legal infractions rather than to punish them, and thus in an alternative to fines, penalties and forfeitures. Therefore, the injunction is not readily classifiable as one of the exempted governmental exactions.

There is an alternative available to governments challenging the discharge of an obligation owed to them by a debtor in bankruptcy. They can claim that the obligation cannot be discharged because it is not a debt, since the Code refers only to debts.<sup>136</sup> The Code defines "debt" as "liability on a claim."<sup>137</sup> The term claim is defined as:

(A) right to a payment . . . (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.<sup>138</sup>

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<sup>126</sup> 11 U.S.C. §§ 727(a)(2) and (3) (1982).

<sup>127</sup> *Id.* § 727(a)(4).

<sup>128</sup> *Id.* § 727(a)(5)-(7).

<sup>129</sup> *Id.* §§ 727(a)(8) and (9).

<sup>130</sup> *Id.* § 727(b).

<sup>131</sup> Exemptions from discharge are listed in a separate provision since they apply to all claims for discharge whether in liquidation or reorganization proceedings. *See* 11 U.S.C. § 523 (1982).

<sup>132</sup> *Id.* § 523(a)(2).

<sup>133</sup> *Id.* § 523(a)(4).

<sup>134</sup> *Id.* § 523(a)(6).

<sup>135</sup> *Id.* § 523(a)(7).

<sup>136</sup> *Id.* §§ 524, 727.

<sup>137</sup> *Id.* § 101(11).

<sup>138</sup> *Id.* §§ 101(4)(A) and (B).

It is under the second definitional category that governments have challenged the inclusion of mandatory injunctive judgments within the class of claims subject to discharge.<sup>139</sup>

The legislative history of this definition of "claim" gives support to the contention that performance-related injunctive remedies were not among those claims Congress intended to include in the definition of debts subject to discharge. A very broad definition of claim, encompassing "all legal obligations of the debtor" that was in original drafts of the Code did not survive to the final bill.<sup>140</sup> The bill as enacted contemplates a limitation in the definition of claims related to equitable remedies, such as injunctions. As explained by the bill's managers in the final floor statements prior to passage:

Section 101(4)(B) [the definition of "claim"] represents a modification of the House-passed bill to include [in] the definition of "claim" a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment. This is intended to cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy . . . . On the other hand, rights to an equitable remedy for a *breach of performance* with respect to which such breach *does not give rise to a right to payment* are not "claims" and would therefore not be susceptible to discharge in bankruptcy.<sup>141</sup>

Thus, Congress narrowed the original conception of claims as "all legal obligations" to exclude equitable remedies that were not reducible to a right to payment so that those claims would be exempt from discharge.

This legislative history and the statutory language suggest that some rights to equitable remedies constitute dischargeable claims while others do not. Equitable remedies and their discharged duty might be differentiated in two ways according to this language. First, rights to equitable remedies that arise from a *breach of performance* (dischargeable) are separable from those that arise from

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<sup>139</sup> See generally Brief of Petitioner at 10–35, *Ohio v. Kovacs*, 105 S. Ct. 705 (1985) [hereinafter cited as Brief of Petitioner]; see also *infra* notes 210–68 and accompanying text.

<sup>140</sup> The legislative reports discussed the original definition of claim, and concluded by noting that "the bill contemplates that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court." See SENATE REPORT, *supra* note 45, at 22, reprinted at 5808.

<sup>141</sup> FLOOR STATEMENTS, *supra* note 92 (emphasis added).

another source (non-dischargeable).<sup>142</sup> Second, rights to equitable remedies arising from a breach of performance would be separable into those that create an alternate *right to payment* (dischargeable) and those that do not (non-dischargeable).<sup>143</sup>

The statute and legislative history are silent with regard to whether injunctive remedies are distinguished because they do or do not arise from a "breach of performance." There is no suggestion as to what other source could exist to give rise to rights to such equitable remedies. However, the legislative history provides some guidance on what might create a "right to payment." In the floor statements, the bill managers provide an illustration:

For example, in some states, a judgment for specific performance may be satisfied by an alternative right to payment, in the event that performance is refused; in that event, the creditor entitled to performance would have a claim for purposes of a proceeding under Title 11<sup>144</sup>

This example suggests that such judgments would only achieve claim status in those states where alternative right to payment is statutorily allowed. One interpretation of this language is that unless state or federal law specifically provides for an alternative right to payment in the case of a right to an equitable remedy, that right is not a claim under the statutory definition.

Applying this rationale to other equitable remedies, such as injunctions, to force compliance with state and federal laws leads to the conclusion that such remedies ought to be outside the definition of claim since failure to comply generally does not give rise to an alternate right of payment. Rather, such failure gives rise to a suit for either contempt or for the alternative equitable remedy of a receivership to force compliance with the terms of the injunction.<sup>145</sup> The earlier discussion of the automatic stay is informative at this point.<sup>146</sup> The stay and discharge provisions are the two chief debtor relief provisions in the Code. One can argue that, just as the debtor enjoys an automatic protection under the stay from enforcement of

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<sup>142</sup> For a discussion of one formulation of this argument by the State of Ohio in *Ohio v. Kovacs*, 105 S. Ct. 705 (1985), see *infra* notes 227-35 and accompanying text.

<sup>143</sup> See *infra* notes 236-42 and accompanying text.

<sup>144</sup> FLOOR STATEMENTS, *supra* note 92, at 6437. Specific performance is an equitable remedy available to compel the performance of the terms of a contract when payment of damages for breach of contract will not provide satisfaction, usually because of the unique nature of the contractual obligation. See FARNSWORTH, CONTRACTS § 12.2 (1984).

<sup>145</sup> See *supra* notes 36-41 and accompanying text.

<sup>146</sup> See *supra* notes 85-97 and accompanying text.



governmental money judgments, there is similarly a discharge of equitable remedies that reduce to a "right to payment." Conversely, the debtor enjoys no automatic protection from enforcement of governmental injunctions, and similarly should not be granted a discharge of those injunctions since they are not equitable remedies for which a right to payment arises.

Therefore, the definition of claim in the Bankruptcy Act permits a conclusion that mandatory cleanup injunctions and some other equitable remedies do not fit within the restricted definition of claim and therefore are to be seen as outside the scope of discharge. In light of this interpretation, such injunctions would be a continuing obligation enforceable against a debtor's post-discharge earnings.<sup>147</sup>

The language and legislative history of the discharge provision unfortunately provide insufficient guidance for a court asked to choose between the conflicting goals of discharge relief and enforcement of regulatory laws. Discharge is intended to permit the debtor to start fresh, unburdened by past debts. The exemptions from discharge are strictly construed so as to be most favorable to the debtor, so that even when parties have violated civil laws such as those protecting the environment, the resulting judgments are not specifically exempted from discharge unless those judgments impose fines, penalties or forfeitures that are not compensation for pecuniary loss. Yet the discharge conditions and exemptions provided in the statute support a conclusion that certain pre- and post-petition activity, specifically fraud and violations of criminal law, should not be condoned by giving the debtor a discharge even when a monetary obligation results. Congress did not want law violators to use bankruptcy as a haven from the consequences of illegal activities. To extend this policy to injunctions, particularly environmental enforcement injunctions that protect public health would be to recognize that the governmental injunction serves a special function protective of the public interest. To permit these injunctions to survive bank-

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<sup>147</sup> In her concurring opinion in *Kovacs*, discussed *infra* notes 210-68 and accompanying text, Justice O'Connor suggests that attempting to exempt injunctions and related obligations from discharge by saying they are not claims would actually prejudice states in the case of the bankruptcy of a corporation under Chapter 7. When a corporation goes into bankruptcy, all of its assets become part of the estate, and after distribution of the assets the corporation dissolves, leaving no post-bankruptcy earnings from which to collect the obligations. See *Kovacs*, 105 S. Ct. at 712 (O'Connor, J., concurring). It may be possible, however, to recover from such corporations without a claim by "piercing the corporate veil," which entails a court holding corporate board members personally liable, and applying their assets to the continuing obligation. See *Plumbers & Fitters Local 761 v. Matt J. Zaich Const. Co.*, 418 F.2d 1054, 1058 (9th Cir. 1969).

ruptcy by determining them to be outside of, rather than exempt from, discharge would enable states and the federal government to ensure that all responsible parties took part in the clean up of environmentally threatening conditions.

### III. LITIGATING THE CONTROVERSY: ENVIRONMENTAL ENFORCEMENT VERSUS BANKRUPTCY RELIEF

As the foregoing discussion of the Bankruptcy Act illustrates, Congress intended that a debtor should be relieved of "the financial pressures that drove him into bankruptcy,"<sup>148</sup> both through the immediate mechanism of the automatic stay, and through the ultimate relief of the discharge of debts. However, Congress also provided that the relief given to a debtor through these provisions should neither hinder nor provide an escape from governmental enforcement of police and regulatory laws protecting health and safety. Courts grapple with the meaning and scope of the provisions of the Code that address these concerns because governments enforce their environmental laws through the use of mandatory injunctions. Courts are attempting to resolve whether judgments that require debtors to spend money are money judgments within the meaning of the automatic stay provision,<sup>149</sup> and whether such judgments are dischargeable debts within the discharge provision.<sup>150</sup>

The following sections discuss the conclusions that courts have reached concerning the enforcement of injunctive remedies against parties in bankruptcy. The first section discusses courts' interpretation of the automatic stay provision and its exceptions. The second section discusses the United States Supreme Court's recent decision interpreting discharge following liquidation.

#### *A. Application of the Automatic Stay to Environmental Enforcement: When is an Injunction Not An Injunction?*

Cases interpreting the application of the automatic stay provision of the Bankruptcy Act of 1978<sup>151</sup> to environmental enforcement ac-

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<sup>148</sup> HOUSE REPORT, *supra* note 14, at 340, reprinted at 6297.

<sup>149</sup> 11 U.S.C. §§ 362(a), (b)(5) (1982).

<sup>150</sup> *Id.* §§ 101(4) and (11).

<sup>151</sup> This article examines only cases decided under the new Bankruptcy Act. See *In re Johnson*, 8 Bankr. 371, 373 (Bankr. D. Minn. 1980) (scope of debtor protection cannot be determined by reliance on cases decided under prior bankruptcy law).

tions concern attempts to enforce environmental injunctions.<sup>152</sup> The governments' argument is that the automatic stay exceptions allow them to enforce such injunctions. Debtors and their trustees challenge the enforcement of the injunctive remedy on the grounds that such a remedy actually constitutes a money judgment that, under the limitation placed on the § 362(b)(5) exception to the stay, may not be enforced against a debtor.

Two courts of appeal have taken opposite positions on the issue of whether an injunction may be enforced against a debtor who claims the protection of the automatic stay. The Sixth Circuit Court of Appeals decided in *In re Kovacs*<sup>153</sup> (Kovacs I) that a state action to enforce an environmental injunction was enforcement not of an injunction but of "in essence . . . a money judgment," and thus an action not excepted from the automatic stay.<sup>154</sup>

In 1976, the State of Ohio brought suit against William Lee Kovacs for his connection with the disposal of hazardous chemicals at the Chem-Dyne site in Hamilton, Ohio.<sup>155</sup> Kovacs was charged with, among other things, dumping on the site large quantities of pesticides that were leaking into a nearby river causing fish kills and other natural resource damage, and threatening public water sup-

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<sup>152</sup> A related issue that often gives rise to litigation is whether state and federal government units may pursue actions seeking the entry of judgments, including mandatory injunctions, pursuant to environmental statutes. These cases involve interpretation of section 362(b)(4), which permits state actions seeking entry of a judgment to proceed as an exception to the section 362(a)(1) stay of all proceedings. See *supra* notes 74-79 and accompanying text.

Several courts have addressed this issue. In *Illinois v. Electrical Utilities*, 41 Bankr. 874 (N.D. Ill. 1984), and *Department of Env'tl. Resources v. Pegg's Run Coal*, 423 A.2d 765 (Pa. Commw. Ct. 1980), the courts resolved the issue in favor of the states. The courts found the statutory language unambiguous in exempting actions seeking entry of judgments from the automatic stay. However, in *United States v. Johns-Manville Sales Corp.*, 13 ENVTL. L. REP. 20,310 (ENVTL. L. INST.) (D.N.H. Nov. 15, 1982), the district court found that, because of the automatic stay of bankruptcy, it did not have jurisdiction to hear an action by the U.S. Environmental Protection Agency seeking a mandatory clean-up injunction under CERCLA. See *CAVEAT CREDITOR*, *supra* note 60, at 10182-83; see also Comment, *Bankruptcy and Environmental Regulation: An Emerging Conflict*, 13 ENVTL. L. REP. 10099 (ENVTL. L. INST.) (1983).

<sup>153</sup> 681 F.2d 454 (6th Cir. 1982), *vacated and remanded*, 459 U.S. 1167 (1983) (Kovacs I). The *Kovacs I* decision was vacated and remanded to the Sixth Circuit to consider the question of mootness. At that time, an appeal was pending in the Sixth Circuit from a lower court decision regarding Kovacs' discharge. The Sixth Circuit affirmed that decision and the state appealed to the United States Supreme Court. *In re Kovacs*, 717 F.2d 984 (6th Cir. 1983), *cert. granted sub nom.* *Ohio v. Kovacs*, 465 U.S. 1078 (1984) (Kovacs II). The case was decided on January 9, 1985. *Ohio v. Kovacs*, 105 S. Ct. 705 (1985). For a discussion of *Kovacs*, see *infra* notes 210-68 and accompanying text.

<sup>154</sup> 681 F.2d at 456.

<sup>155</sup> Kovacs was sued individually and in his capacity as officer of several defendant corporations. *Id.* at 454.

plies.<sup>156</sup> Three years later, after negotiations with the state officials, Kovacs signed a stipulation, and judgment was entered against him, enjoining him from causing any further pollution: He was ordered under a mandatory injunction to remove hazardous wastes from the premises, and to pay \$75,000 to the state as compensation for natural resource damage.<sup>157</sup> Kovacs failed to comply with the judgment<sup>158</sup> and in fact brought additional wastes onto the site.<sup>159</sup> In February of 1980, a state court granted the state's motion for the appointment of a receiver to collect Kovacs' non-exempt assets and apply them to the cleanup order.<sup>160</sup> The state court found that Kovacs had acted "in flagrant disregard of the Stipulation and Judgment Decree" and ordered Kovacs to cooperate fully with the receiver.<sup>161</sup>

In July of 1980, Kovacs filed a personal petition for bankruptcy.<sup>162</sup> In September, the state moved for a hearing to determine Kovacs' current employment status and income to assure that there would be adequate funding to effectuate the cleanup ordered by the court.<sup>163</sup> Kovacs moved to restrain this action, asserting the protection of the automatic stay.

In *In re Kovacs*,<sup>164</sup> the Sixth Circuit affirmed both the bankruptcy court and the district court's decisions<sup>165</sup> that the state's action was subject to the automatic stay provision of the Code. In its brief *per curiam* opinion, the Sixth Circuit held that the state's action against Kovacs should be stayed because it was "no different in substance from" the enforcement of a money judgment,<sup>166</sup> which, under the section 362(b)(5) exception to the automatic stay, is *not* excepted, even when sought by a governmental police or regulatory unit.<sup>167</sup> The court adopted the bankruptcy court's approach, which focused on the *mechanism* used by the state (a hearing to determine wages) rather than on the underlying *judgment* being enforced (mandatory injunction) to determine whether the enforcement action should be

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<sup>156</sup> Kovacs allegedly participated in the dumping of large quantities of three carcinogenic pesticides. These substances were leaking into the Great Miami River and its tributary. Brief for the United States, *supra* note 12, at 2-3.

<sup>157</sup> Brief of Petitioner, *supra* note 138, at 5.

<sup>158</sup> *Id.* at 6.

<sup>159</sup> Brief for the United States, *supra* note 12, at 3.

<sup>160</sup> Brief of Petitioner, *supra* note 138, at 6.

<sup>161</sup> 681 F.2d at 455.

<sup>162</sup> *Id.* at 455.

<sup>163</sup> Brief of Petitioner, *supra* note 138, at 4.

<sup>164</sup> 681 F.2d 454 (6th Cir. 1982).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 456 (quoting *In re Mansfield Tire & Rubber Co.*, 660 F.2d 1108 (6th Cir. 1981)).

<sup>167</sup> *Id.*

stayed.<sup>168</sup> The Sixth Circuit, admitting that the Bankruptcy Act "indicates a clear intent to permit governmental units to continue to enforce their police power through mandatory injunctions,"<sup>169</sup> nevertheless found that the state's enforcement proceeding, because it was "collect[ing] money," sought what "in essence amounted to a money judgment against Kovacs, which was properly subject to the automatic stay."<sup>170</sup>

The Sixth Circuit in *Kovacs I* considered the state's action equivalent to a creditor's action to gain preferential treatment for its debt, and concluded that such an action undermines the essential debtor protections of the Act.<sup>171</sup> Thus the *Kovacs I* court ignored the injunctive "form" of the state's enforcement action in applying the stay provision to the government's suit. Instead, it concluded that the true "substance" of that claim was a money judgment because money was being collected.<sup>172</sup>

This reasoning is subject to criticism because by equating the state's injunction with a "money judgment," the court ignored the language of the bankruptcy statute and its legislative history, and contradicted its own assertion that mandatory injunctions were intended to be enforced. The court thus actually elevated the monetary "form" of the collection over the injunctive and remedial "substance" of the judgment.

The Third Circuit in *Penn Terra Ltd. v. Department of Environmental Resources*<sup>173</sup> rejected the reasoning of the *Kovacs I* decision, on the grounds that the broad interpretation of the term "money judgment" in that decision was unsupported by either the language or the intent of the Bankruptcy Act. The facts of the *Penn Terra* case are similar to those of *Kovacs I*. In November of 1981, Penn Terra Ltd., the operator of coal surface mines in Pennsylvania, entered into a consent order resulting from its admitted violation of Pennsylvania environmental laws in connection with its mining activities.<sup>174</sup> In the order, Penn Terra agreed to perform immediate reclamation work on the mines and to submit and implement a total reclamation plan, all within a fixed schedule.<sup>175</sup> Penn Terra failed to

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<sup>168</sup> See *id.* at 455-56.

<sup>169</sup> *Id.* at 456.

<sup>170</sup> *Id.*

<sup>171</sup> See *id.*

<sup>172</sup> See *id.*

<sup>173</sup> 733 F.2d 267 (3d Cir. 1984).

<sup>174</sup> *Id.* at 269.

<sup>175</sup> *Id.* at 269-70 n.2.

comply with that schedule, and in March of 1982, filed a Chapter 7 petition for bankruptcy.<sup>176</sup>

Several weeks later, the Pennsylvania State Department of Environmental Resources (DER), unaware of the bankruptcy filing, brought an action in equity in a Pennsylvania state court seeking a preliminary injunction against Penn Terra and its president to correct the violations and to enforce the terms of the consent order.<sup>177</sup> In late May, DER obtained an order in the state court for injunctive relief against Penn Terra; the order required Penn Terra to perform studies within 15 days and make improvements at the mines within 6 months.<sup>178</sup> Penn Terra responded by filing a petition for contempt in the bankruptcy court against DER's attorneys.<sup>179</sup> In *In re Penn Terra Ltd.*,<sup>180</sup> the bankruptcy court fined the DER attorneys and enjoined DER from enforcing the May order from the state court.<sup>181</sup> The bankruptcy court explicitly relied upon *Kovacs I*<sup>182</sup> in concluding that the "mandatory injunction sought by DER requiring the debtor's expenditure of funds is in essence the attempted enforcement of a money judgment."<sup>183</sup> The district court affirmed.<sup>184</sup>

On appeal, the Third Circuit reversed. In resolving the controversy presented in *Penn Terra Ltd. v. Department of Environmental Resources*,<sup>185</sup> the Third Circuit carefully considered the full scope of the legal proceeding against a debtor under the protection of the automatic stay provision of the Bankruptcy Act. The court recognized that the stay exceptions "return to the States with one hand some of what they had taken away with the other."<sup>186</sup> It concluded that the issues before it were whether the DER's actions came within the police or regulatory power of the state, and, if so, whether DER's actions were an attempt to enforce a money judgment.

Prior to addressing these factual issues, the court discussed the principles of statutory construction that governed its interpretation

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<sup>176</sup> *Id.* at 269-70.

<sup>177</sup> *Id.* at 270.

<sup>178</sup> *Id.* at 270 and n.3.

<sup>179</sup> *Id.* at 270.

<sup>180</sup> 24 Bankr. 427 (Bankr. W.D. Pa. 1982).

<sup>181</sup> *Id.* at 435.

<sup>182</sup> *In re Kovacs*, 681 F.2d 454 (6th Cir. 1982); see *supra* notes 153-72 and accompanying text.

<sup>183</sup> *In re Penn Terra Ltd.*, 24 Bankr. at 433.

<sup>184</sup> Unreported decision; affirmance is reported in *Penn Terra Ltd. v. Department of Env'tl. Resources*, 733 F.2d 267, 270 (3d Cir. 1984).

<sup>185</sup> 733 F.2d 267 (3d Cir. 1984).

<sup>186</sup> *Id.* at 272.

of the intersection of the federal law of bankruptcy and the state environmental protection laws. The Third Circuit addressed Penn Terra's argument that the federal bankruptcy law displaced or "preempted" the state's enforcement action.<sup>187</sup> The court concluded, however, that because the law does not favor such displacement, the federal restoration of state enforcement power through the exceptions to the automatic stay should be broadly construed to allow enforcement.<sup>188</sup> By contrast, the section 362(b)(5) limit on the enforcement of money judgments, which constricts state enforcement power, should be narrowly construed.<sup>189</sup> The court supported its conclusion that the automatic stay exceptions restore broad power to state governments by referring to section 105 of the Code.<sup>190</sup> That provision permits courts to stay actions in those situations when "the exercise of state power, even for the protection of the public health and safety, may run so contrary to the policy of the Bankruptcy Code that it should not be permitted."<sup>191</sup> The court found that because section 105 and not the automatic stay is the proper mechanism for enjoining government enforcement actions in such circumstances, the court may exercise "latitude in favor of state regulatory powers" when, as in this case, it is interpreting the applicability of the automatic stay provision to an exercise of that regulatory enforcement power.<sup>192</sup>

In analyzing the issues before it, the Third Circuit first concluded that the state's action for injunctive relief was one to enforce police and regulatory power.<sup>193</sup> It then proceeded to analyze the definition

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<sup>187</sup> *Id.* at 272-74. Pre-emption is a doctrine that derives from the supremacy clause of the United States Constitution, which states that "[t]his Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2. In a pre-emption analysis, a state law that conflicts with a federal statute, either by making it impossible to enforce both laws or by standing as an obstacle to executing the full purposes of Congress, will be found void. *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981). The pre-emption doctrine also arises when federal regulation of a field is so dominant or pervasive that state regulation in the field is assumed to be precluded. *See Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978).

The clash between the federal bankruptcy law and the state environmental enforcement law does not present a classic "pre-emption" question. Typically, pre-emption becomes an issue when a state regulates in an area that the federal government has extensively regulated. *See, e.g., Maryland v. Louisiana*, 451 U.S. at 746 (claimed pre-emption of state law taxing natural gas by federal Natural Gas Policy Act).

<sup>188</sup> *Penn Terra*, 733 F.2d at 273. The court's approach to statutory construction requires an "explicit" statement in the federal law that the state law is overridden "[w]here important state law or general equitable principles protect some public interest." *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *See* 11 U.S.C. § 105(a) (1982).

<sup>191</sup> 733 F.2d at 273.

<sup>192</sup> *Id.* at 274.

<sup>193</sup> *Id.*

of "enforcement of a money judgment" as used in section 362(b)(5).<sup>194</sup> Since the bankruptcy statute does not specifically define "money judgment" the court looked to common usage to see what was meant by the term. It found that a money judgment was traditionally a court order requiring the defendant to pay a definite and certain sum of money to the plaintiff after a verdict for plaintiff.<sup>195</sup> An action to *enforce* that judgment is typically an action by plaintiff to seize the defendant's property to sell it, if necessary, to satisfy that judgment. DER's action, the court found, did not fit this form.<sup>196</sup> DER's original action was an action in equity to compel performance. This action could not have resulted, and did not result in the entry of a sum certain. Therefore, its enforcement could not be the enforcement of a money judgment.<sup>197</sup>

The court then rejected defendant's claim, accepted by the district court, that DER's suit was "in substance" an action to obtain and subsequently to enforce a money judgment.<sup>198</sup> The court relied upon its own earlier opinion in *United States v. Price*<sup>199</sup> to reject this argument. In *Price*, the Third Circuit had undertaken a lengthy examination, in a non-bankruptcy context, of a mandatory injunction that required a defendant to pay for studies in anticipation of a hazardous waste cleanup. The injunction ordering the payment of the money for that study was determined to be clearly distinct from money damages.<sup>200</sup> Specifically, the Third Circuit stated in *Price*:

[d]amages are awarded as a form of substitutional redress, they are intended to compensate a party for an injury suffered or other loss. A request for funds for a diagnostic study of the public health threat posed by the continuing contamination and its abatement is not, in any sense, a traditional form of damages. The funding of the diagnostic study . . . though it would require monetary payments, would be preventative rather than compensatory . . . .<sup>201</sup>

The fact that an injunction may require the payment or expenditure of money does not necessarily foreclose the possibility of equitable relief.

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<sup>194</sup> *Id.* at 274-79.

<sup>195</sup> *Id.* at 275.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 275-77.

<sup>199</sup> 688 F.2d 204 (3d Cir. 1982).

<sup>200</sup> *Id.* at 212.

<sup>201</sup> *Id.*



The *Penn Terra* court also criticized the lower court's reliance on the *Kovacs I* decision.<sup>202</sup> The Third Circuit found the *Kovacs I* interpretation of "money judgment" to be unduly broad, and pointed out that if all orders requiring the expenditure of money were money judgments, then the section 362 exception for enforcement of government judgments would be "narrowed into virtual non-existence."<sup>203</sup>

In its concluding statement, the Third Circuit stated that the bankruptcy court had placed too much weight on the value of preserving the debtor's funds, and instead should have seen that the statutory exceptions to the stay provision require the debtor protection policy of the stay provision in some cases to "yield to higher priorities,"<sup>204</sup> such as protection of public health and the environment. To maintain the proper balance between the competing policies, the court suggested focusing instead on the *nature of the injuries* to be redressed by the challenged remedy, and whether those injuries are "traditionally rectified by a money judgment and its enforcement."<sup>205</sup> It concluded that the remedy sought by DER was "neither in form or substance, the type of remedy traditionally associated with the conventional money judgment . . . . [T]he Commonwealth Court's injunction was meant to prevent future harm to, and restore, the environment . . . and did not constitute an action to enforce a money judgment."<sup>206</sup>

The polar opposite decisions reached by the courts of appeal in *Penn Terra* and *Kovacs* may be interpreted as the result of courts choosing between conflicting policies. The *Kovacs* court upheld the policy of bankruptcy protection, and the *Penn Terra* court supported the state's right to enforce its environmental laws. The *Kovacs I* court's cursory opinion failed to examine the whole context in which to construe the stay provision with its exceptions allowing governmental enforcement. Specifically, that court did not consider the state policy being forwarded by the action, the nature of the injuries being addressed in the remedy sought to be enforced, and finally, the fact that section 105, not the automatic stay, is the mechanism for staying burdensome state actions that are not money judgments. The *Kovacs I* court therefore also did not go through a full section 105 analysis,<sup>207</sup> with its requisite balancing of interests. Rather, it

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<sup>202</sup> 733 F.2d at 277.

<sup>203</sup> *Id.* at 277-78.

<sup>204</sup> *Id.* at 278.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See *supra* notes 99-109 and accompanying text.

saw a possible cost to the debtor, labelled it a "money judgment," and then concluded that the automatic stay was still in force.

In contrast, the *Penn Terra* court proceeded from the more carefully supported position that the stay exceptions would not have been included in the Bankruptcy Act if Congress had not intended to empower governments to continue to protect their citizens by regulating public actors who had declared bankruptcy.<sup>208</sup> This broad reading by the Third Circuit of the power restored to government to pursue their enforcement actions is supported by the legislative history of the stay exceptions and the clear language of the exceptions themselves. The court recognized that such regulation and enforcement, if too burdensome on the debtor or the trustee in his administration of the estate, was properly halted only under the provisions of section 105, which puts a burden on the trustee to present evidence and persuade the court that the stay is necessary. Section 105 assures that the court undertakes a systematic consideration of the interests involved. As the *Penn Terra* court realized, because section 105 requires the court to consider the interests of both the government and the debtor, as well as the public interest, it is not the automatic stay, but rather section 105, that is the proper mechanism for determining if an enforcement action should be stayed.<sup>209</sup>

*B. Discharge of the Obligation to Perform an Environmental Cleanup Injunction: Ohio v. Kovacs*

As the foregoing discussion of the courts of appeals cases interpreting the automatic stay provision suggests,<sup>210</sup> conflicts between the protections of the Bankruptcy Code and states regulatory au-

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<sup>208</sup> See *supra* notes 189-92 and accompanying text.

<sup>209</sup> Two courts have evaluated requests by debtors for a discretionary stay under § 105 to halt state environmental enforcement actions. In *In re Thomas Solvent*, 44 Bankr. 83 (Bankr. W.D. Mich. 1984), the bankruptcy court ordered the stay of a state's attempt to enforce a mandatory injunction to clean up improperly stored chemicals. While ostensibly granting the stay under section 105 at the debtor's request, the court did not follow the "typical rules for the issuance of an injunction," see *supra* notes 106-08 and accompanying text. Instead the court analyzed the request under precedents applicable to the automatic stay, an approach that failed to put the burden on the debtor to show why the injunction should issue. *In re Thomas Solvent*, 44 Bankr. at 85-87.

The court in *In re Territo*, No. 83-06072, slip op. (Bankr. D.N.J. 1984) held that neither the automatic stay, nor a stay under section 105, would halt the State of Ohio's suit to protect the state's environment from improper oil and gas production processes. *Id.* at 4. The court noted in its brief section 105 analysis that the debtor had failed to make the requisite showing for issuance of an injunction, which the court said was a two-fold showing of (1) irreparable injury and (2) likelihood of success on the merits. *Id.* at 5.

<sup>210</sup> See *supra* notes 151-209 and accompanying text.

thority present a potentially irreconcilable clash of policies. In the more particular intersection of the automatic stay and its exceptions with an injunction imposed by a regulatory authority, the Bankruptcy Code helps to resolve that clash by permitting the court to find, as the Third Circuit did in *Penn Terra*,<sup>211</sup> that the regulatory goal supersedes the protections of the Bankruptcy Code so that the underlying public interest is served. The soundness of the *Penn Terra* approach rests not only in its resolution of statutory ambiguity, but in its recognition that when the Bankruptcy Code threatens to undercut state regulatory authority, a court must resolve the underlying conflict with sensitivity to, and systematic attention to, the state interest involved. The issue of the discharge of an obligation to a state that arises from an injunctive judgment presents another example of such conflict, resolved in favor of the debtor and the protections of bankruptcy by the United States Supreme Court in *Ohio v. Kovacs*.<sup>212</sup>

The saga of the State of Ohio's attempt to enforce its injunction against William Lee Kovacs did not end with its unsuccessful bid to enforce it in spite of the automatic stay. After the state's action to discover Kovacs' current income and assets was halted by the stay, the state filed a complaint in bankruptcy court seeking a declaration that Kovacs' obligation under the state injunction was non-dischargeable.<sup>213</sup> The bankruptcy court held against the state, and ruled that Kovacs' obligation to clean up the site was a claim dischargeable in bankruptcy.<sup>214</sup> Its decision was affirmed by the district court,<sup>215</sup> and by the Sixth Circuit which, in *In re Kovacs*<sup>216</sup> (*Kovacs II*), readopted its own reasoning from *Kovacs I*.<sup>217</sup> The Sixth Circuit held that the state's judgment was essentially a money judgment, and thus subject to discharge like all money judgments of creditors.<sup>218</sup> The State of Ohio appealed to the United States Supreme Court.<sup>219</sup>

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<sup>211</sup> *Penn Terra v. Dept. of Env'tl. Resources*, 733 F.2d 267 (3d Cir. 1984).

<sup>212</sup> 105 S. Ct. 705 (1985).

<sup>213</sup> Parties seeking to challenge dischargeability are required to file a complaint in the bankruptcy court where the bankruptcy petition was filed. FED. BANKR. R. 7001(7).

<sup>214</sup> 29 Bankr. 816 (Bankr. S.D. Ohio 1982).

<sup>215</sup> Unpublished opinion, cited in *Kovacs*, 717 F.2d at 484.

<sup>216</sup> 717 F.2d 484 (6th Cir. 1983). See *supra* notes 153-72 and accompanying text.

<sup>217</sup> 681 F.2d 454 (6th Cir. 1982). See *supra* notes 173-206 and accompanying text.

<sup>218</sup> 717 F.2d at 787-88. The bankruptcy and district courts below in *Kovacs II* relied on the reasoning in *Kovacs I* to formulate their opinion that Kovacs' obligation was dischargeable. However, after the district court ruled in *Kovacs II*, the Court reversed and remanded the Sixth Circuit's ruling in *Kovacs I*. 103 S. Ct. 810 (1983). Therefore, the Sixth Circuit in *Kovacs II* could not rely, as had the bankruptcy and district courts, on the "law of the case." *In re Kovacs*, 717 F.2d at 987. The Sixth Circuit asserted that its affirmation of the lower court's

In *Ohio v. Kovacs*,<sup>220</sup> Kovacs argued that his obligation to remove toxic waste from the Chem-Dyne site was dischargeable because it fell within the statutory definition of both debt and claim, and therefore was not specifically exempted by the exemption provision<sup>221</sup> of the Bankruptcy Act.<sup>222</sup> He claimed that the state court's order was a mere "contract" with the state to do certain things and to pay money in return for his release from liability.<sup>223</sup> Furthermore, Kovacs asserted that the state's choice to appoint a receiver was "extremely significant."<sup>224</sup> Since the receiver took over all Kovacs's assets and applied them to the cost of clean up, the state court's order no longer commanded performance of an act, but had become instead a dischargeable obligation to pay money.<sup>225</sup> Kovacs also argued that the discharge of his debt to the state did not impair the state's ability to enforce its environmental laws. In fact, he claimed, this case involved no issue of environmental law, but instead involved the "much more basic human issue" of whether he should receive the "fresh start" provided by the Bankruptcy Act in its discharge provision.<sup>226</sup>

Throughout its battle to have Kovacs' obligation under the injunction declared non-dischargeable, the state eschewed any argument that the obligation fit into any of the categories of debts that were statutorily exempt from discharge.<sup>227</sup> Instead, the state argued that the debtor's obligation to the state arose from a violation of law, and therefore is distinct from the kind of private financial obligation for which the bankruptcy law provides relief when that obligation is not a money judgment but instead is a continuing obligation.<sup>228</sup> To relieve the debtor of such obligations, the state argued, would effectively preclude the state from using injunctive remedies to achieve envi-

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decisions to discharge the obligation to the state was "for a different reason" than its own prior reasoning in *Kovacs I. Id.* However, the court expressly readopted its prior reasoning that the payments to the receiver sought by the state was a "money judgment equivalent" and thus subject to discharge. *Id.* at 988.

<sup>219</sup> *Cert. granted sub nom.* *Ohio v. Kovacs*, 104 S. Ct. 1438 (1984).

<sup>220</sup> 105 S. Ct. 705 (1985).

<sup>221</sup> 11 U.S.C. § 523 (1982). See *supra* text and notes at notes 131-35.

<sup>222</sup> Brief of Respondent at 7-12, *Ohio v. Kovacs*, 105 S. Ct. 705 (1985) [hereinafter cited as Brief of Respondent].

<sup>223</sup> *Id.* at 8.

<sup>224</sup> *Id.* at 9.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 13.

<sup>227</sup> Brief of Petitioner, *supra* note 139.

<sup>228</sup> *Id.* at 8, 20-23.

ronmental and related public safety objectives.<sup>229</sup> Specifically, the state argued that the obligation imposed on Kovacs by the state court was not within the Code's section 101(4) definition of claim because the obligation arose from a violation of law, not a contractual "breach of performance."<sup>230</sup> Additionally, Kovacs' failure to fulfill his obligation did not give rise to an alternative right to payment as required by the statute and thus was not a dischargeable "claim."<sup>231</sup>

In support of its contention that the judgment against Kovacs did not arise from a breach of performance, the state distinguished between the obligation owed by Kovacs to the state and its citizens because of his violation of environmental laws, and the kind of private contractual obligation to which the statute and legislative history referred in its definition of "claim."<sup>232</sup> A "breach of performance," the state argued, could only arise from the failure to fulfill a contractual obligation, not from the failure of a party to fulfill his statutory duty under a court order.<sup>233</sup> The state pointed out that the consent decree, entered into by Kovacs and chosen by the state because it could then more quickly and more effectively clean up the site, arose as an alternative to criminal sanctions that a court could have imposed on Kovacs because of his violation of Ohio law.<sup>234</sup> When Kovacs failed to comply with the consent decree, which gave rise to the mandatory injunction and the receivership, those judgments were still based on the violation of law, not on a "breach of performance."<sup>235</sup>

The state then argued that the legislative history of the definition of "claim" made clear that those obligations were not money damages or their equivalent, because they cannot be reduced to a sum certain,

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<sup>229</sup> *Id.* at 10, 43.

<sup>230</sup> *Id.* at 8, 14-31. See *supra* text and notes at notes 140-47.

<sup>231</sup> *Id.* at 9, 31-37.

<sup>232</sup> *Id.* at 11-19, 22-23.

<sup>233</sup> *Id.* at 19-20.

<sup>234</sup> *Id.* at 23-24.

<sup>235</sup> *Id.* at 24-26. In support of this position, the State argued that the obligation owed to it by Kovacs was akin to restitution, for which federal courts have carved out an exception to discharge despite the fact that restitution payments are not statutorily exempted in section 523 of the Code, 11 U.S.C. § 523 (1982), Brief of Petitioner, *supra* note 139, at 23 (citing *United States v. Carson*, 669 F.2d 216 (5th Cir. 1982); *In re Cox*, 33 Bankr. 657 (Bankr. M.D. Ga. 1983)).

In its brief, the United States also argued the analogy between Kovacs' debt and restitution. The Solicitor General pointed out that, in carving out this exception for restitution payments, the courts looked to the purpose of the obligation owed (rehabilitation) rather than to the form that obligation took (money payments) and thus followed the approach that the *Penn Terra* court had taken in evaluating an obligation similar to Kovacs'. See Brief for the United States, *supra* note 12, at 22-23.

and do not give rise to an alternative right of payment.<sup>236</sup> Therefore, such obligations are non-dischargeable because they are not claims.<sup>237</sup> The state cited the legislative history, and pointed out that the final, more limited definition of claim adopted by Congress included only obligations giving rise to such alternate right of payment.<sup>238</sup> In particular, the state argued that its receivership was not, as Kovacs argued,<sup>239</sup> an alternative to the payment of Kovacs's obligation. Rather, it was an effectuation of that obligation because the money collected by the receivership was not to compensate the state for payments made to clean up, but to apply to the cleanup effort.<sup>240</sup> As the state explained in its brief to the Court:

The reality of the situation is that there is no alternative to performance of the injunction to abate the peril to the people of Hamilton. Kovacs can make no payment to anyone and thereby leave the continuing threat to the citizens of Ohio unabated. Rather, any expenditure by Kovacs goes to the receivership to assist in the cleanup.<sup>241</sup>

Last, the state argued that the decision below would enable a bankruptcy court to excuse violators of the law from their continuing obligations, and thus "effectively destroy"<sup>242</sup> the states' ability to protect citizens through injunctive actions against such offenders.

Such a decision, the state argued, runs counter to two policies in the bankruptcy code itself. The first, vindicated by the Third Circuit in *Penn Terra*,<sup>243</sup> is to preserve the ability of states and other governmental units to use and enforce equitable remedies against debtors in order to protect their citizens from future harm.<sup>244</sup> The second closely related policy is to preserve the bankruptcy system as a shelter from financial overextension by honest debtors but to prevent it from becoming a haven for wrongdoers.<sup>245</sup>

The Supreme Court in *Ohio v. Kovacs*<sup>246</sup> rejected the state's arguments and unanimously affirmed the decision of the Sixth Circuit

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<sup>236</sup> Brief of the Petitioner, *supra* note 139, at 31.

<sup>237</sup> See, e.g., 11 U.S.C. § 101(4)(B) (1982) and *supra* notes 136-39 and accompanying text.

<sup>238</sup> Brief of the Petitioner, *supra* note 138, at 13. See *supra* notes 140-41 and accompanying text.

<sup>239</sup> Brief of Respondent, *supra* note 222, at 9.

<sup>240</sup> Brief of Petitioner, *supra* note 139, at 31-37.

<sup>241</sup> *Id.* at 37.

<sup>242</sup> *Id.* at 41-44.

<sup>243</sup> 733 F.2d 267 (3d Cir. 1984). See *supra* notes 173-206 and accompanying text.

<sup>244</sup> Brief of Petitioner, *supra* note 139, at 41-42.

<sup>245</sup> See Brief for the United States, *supra* note 12, at 7-8, 25; see also Brief of Petitioner, *supra* note 139, at 43.

<sup>246</sup> 105 S. Ct. 705 (1985).

that had permitted Kovacs to be discharged from his obligation to clean up the Chem-Dyne site. The Court first addressed itself to the state's arguments that claims relating to debts subject to discharge referred only to contractual obligations and not to obligations arising from violation of statutes. In dismissing that argument, the Court pointed out that no such distinction exists in the Code.<sup>247</sup> The Court reasoned that all of Kovacs' obligations to the state bore the same character as claims. Since Kovacs' obligation to pay \$75,000 in compensation for natural resource damages was clearly a dischargeable claim, the Court stated that "it makes little sense to assert that because the cleanup order was entered to remedy a statutory violation, it cannot likewise constitute a claim for bankruptcy purposes."<sup>248</sup>

The Court also disposed of the state's argument that its judgment did not give rise to an "alternate right to payment."<sup>249</sup> Finding the statutory language and legislative history to be sparse yet unambiguous, the Court agreed with the bankruptcy court and the court of appeals below that the state had a claim against Kovacs within the meaning of section 101(4) of the statute.<sup>250</sup> The Court expressly adopted the reasoning of the court of appeals, that concluded Kovacs could no longer personally clean up the site, so "the cleanup duty had been reduced to a monetary obligation."<sup>251</sup>

The Court saw the appointment of a receiver as determinative. Acknowledging that the state may correctly have chosen to put Kovacs' assets into receivership to pay for the cleanup, the Court concluded:

[a]s wise as this course may have been, it dispossessed Kovacs, removed his authority over the site, and divested him of assets that might have been used by him to clean up the property . . . . Although Kovacs had been ordered to "cooperate" with the receiver, he was disabled by the receivership from personally taking charge of and carrying out the removal of wastes from the property. What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs . . . . Had Kovacs furnished the necessary funds, either before or after bankruptcy, there seems little doubt that the receiver and the State would have been satisfied.<sup>252</sup>

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<sup>247</sup> *Id.* at 708.

<sup>248</sup> *Id.* at 708-09.

<sup>249</sup> *Id.* at 709.

<sup>250</sup> *Id.* at 709-10.

<sup>251</sup> *Id.* at 710.

<sup>252</sup> *Id.* at 710-11.

Thus, the state's choice to "dispossess" Kovacs, rather than to institute civil or criminal contempt proceedings against him, meant that Kovacs' obligation had been "converted into an obligation to pay money, an obligation that was dischargeable in bankruptcy."<sup>253</sup>

This conclusion that the state's judgment against Kovacs had been "transformed" into a money judgment echoes the Sixth Circuit's automatic stay decision in *Kovacs I*, and is as inadequate as that decision is in articulating why the Court chose to prefer the policy of debtor relief over the conflicting policy of regulatory enforcement. The Court addressed neither the ambiguity in the Code's definition of "claim" as it relates to equitable remedies,<sup>254</sup> nor the argument that the narrow definition of money judgment in the automatic stay provision as formulated by the *Penn Terra* court might inform the limits of the discharge provision.<sup>255</sup> As a result, no credence was given to the idea underlying those arguments, namely that the Code makes an analytical distinction in its relief provisions between equitable remedies, which are not stayed and are only sometimes discharged, and money judgments, which are never stayed and always discharged. By accepting the lower court's equation that in Kovacs' case, an injunction plus receivership equals a money judgment the Court muddies the distinction from the Code, and perhaps, as the *Penn Terra* court suggests, "narrow[s] it into virtual nonexistence."<sup>256</sup>

However, what is more troubling with the Court's analysis is not the dissatisfying analytical tack taken, but rather the short shrift given to the important policy considerations forwarded by the state and its *amici* in this case. The Court makes no reference to the fact that its disposition of this case means a choice between a federal and state policy, nor does the Court refer to the fact that in Kovacs' case, application of the bankruptcy law has effectively nullified the

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<sup>253</sup> *Id.* at 711.

<sup>254</sup> The Court briefly discussed the legislative history, and selectively quoted from part of the legislative history, compare 105 S. Ct. at 709 with discussion of § 101(4)(B), in FLOOR STATEMENTS, *supra* note 92; see also *supra* note 141 and accompanying text. This approach to the legislative history gives no credence to the argument suggested by the bill's managers that the definition of "claim" was intended to *exclude* some equitable remedies from discharge. See *supra* notes 139-46 and accompanying text.

<sup>255</sup> The state forwarded this argument, see Brief of Petitioner, *supra* note 139, at 10, 41-44. It was made more forcefully, however, by the Solicitor General in his *amicus* brief. See Brief for the United States, *supra* note 12, at 8-17.

The Court acknowledged the *Penn Terra* case in a footnote, but distinguished it since the Commonwealth of Pennsylvania had not appointed a receiver. 105 S. Ct. at 711, n. 11.

<sup>256</sup> *Penn Terra v. Department of Env'tl. Resources*, 733 F.2d 267, 278-79 (3d Cir. 1984).



enforcement of an important state objective, the protection of public health and safety.

The Court indirectly addressed this issue by being "careful"<sup>257</sup> to emphasize what it had not decided. Specifically, the Court said that the decision to grant a discharge did not prevent the state from prosecuting Kovacs for his violation of the environmental laws of Ohio,<sup>258</sup> or for criminal contempt for his failure to perform under the injunction.<sup>259</sup> The Court suggested that, had Ohio imposed fines or monetary penalties on Kovacs prior to bankruptcy, those fines or penalties would be exempt from discharge under the bankruptcy statute,<sup>260</sup> and, in its most oblique qualification, the Court refused to speculate on the result had Kovacs taken bankruptcy before the appointment of the receiver.<sup>261</sup> In addition, the Court stated that it did not hold that the injunction preventing Kovacs from bringing any further wastes on the premises was discharged, but instead addressed "only the affirmative duty to clean up the site and the duty to pay money to that end."<sup>262</sup>

This *caveat* to the Court's holding sends a confusing message to the states and the federal government regarding the use and enforcement of mandatory injunctions to require clean-up under environmental regulatory laws.<sup>263</sup> As one commentary has noted, in light of the *Ohio v. Kovacs* language, dischargeability of an obligation seems to depend in part on the mechanism the government chooses to use in its enforcement.<sup>264</sup> If the government imposes an injunction and, in the face of non-compliance, the court issues fines and penalties, either under its contempt power or under the statutory exemption, such fines and penalties would be enforceable. Such enforce-

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<sup>257</sup> 105 S. Ct. at 711.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> See *In re Robinson*, 46 Bankr. 136 (Bankr. M.D. Fla. 1985).

The confusion also extends to courts attempting to discover the reach of the *Kovacs* holding, and to debtors and potential debtors who face regulatory obligations of all kinds. See *Bankruptcy Protection*, *supra* note 53, at 12.

<sup>264</sup> See CAVEAT CREDITOR, *supra* note 60, at 10174. Drabkin, *et al.*, suggest that under the *Ohio v. Kovacs* language, dischargeability seems also to depend on the debtor's personal ability to comply with the terms of a mandatory injunction. *Id.* One court relied on *Ohio v. Kovacs* in its decision to discharge the obligation of a debtor under a mandatory injunction because the debtor, who had filled in marshland, could not restore the marsh "through his own labor and without expense to the estate." *In re Robinson*, 46 Bankr. 136, 139 (Bankr. M.D. Fla. 1985).

ment may, however, be limited to cases where the fines and penalties were imposed prior to the bankruptcy petition. The obligation to clean up a site might survive as non-dischargeable, so as long as the government does not reduce its injunction to a receivership, which, even the Court suggests,<sup>265</sup> may be the "wisest" and most effective way to achieve the purpose of public protection that underlies the injunction, or does not clean up itself, thereby creating a monetary debt.<sup>266</sup> The Court's decision thus potentially creates a disincentive to rapid and effective cleanup actions by governmental units when bankrupt parties may be involved because of the uncertainty attending the effect of non-action. The only risk-free option left for governments is to pursue environmental violators under the criminal laws, to the extent those laws are applicable, since criminal prosecutions are not subject to the automatic stay provision,<sup>267</sup> and the monetary penalties imposed pursuant to them are not dischargeable. While the criminal prosecution of environmental violators may be appropriate in some instances, it is an unsatisfying way to approach the problem of inadequately disposed wastes because it does not fulfill the purposes of the civil laws, namely to create a remedy that both deters future harm and places the cost of improper disposal on the responsible parties. In addition, if by using a criminal, rather than a civil remedy, a state may reach post-bankruptcy assets, the Court's decision encourages governments to discriminate between parties to an action based on their financial status, which is a result the Code does not countenance.<sup>268</sup> Thus, in *Ohio v. Kovacs* the Court injected even more uncertainty into the vexing problem of how states and the federal government may clean up and deter hazardous waste problems.<sup>269</sup>

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<sup>265</sup> *Ohio v. Kovacs*, 105 S. Ct. at 710.

<sup>266</sup> But see *In re Robinson*, 46 Bankr. 136 (Bankr. M.D. Fla. 1985).

<sup>267</sup> 11 U.S.C. § 362(b)(4) (Supp. V 1984).

<sup>268</sup> For example, the Code's anti-discrimination provisions forbid governmental units from discriminating against current or past debtors in various contexts. 11 U.S.C. § 525 (Supp. V 1984).

<sup>269</sup> In January of 1986, the Court decided another case in which the Code's relief provisions conflicted with environmental enforcement by a state government. In *Mid-Atlantic Nat'l Bank v. New Jersey*, 54 U.S.L.W. 4138 (Jan. 27, 1986), the Court held that a bankruptcy trustee could not exercise statutory powers to abandon burdensome property in contravention of a state statute designed to protect public health or safety. In a 5-4 decision, Justice Powell, relying in part on the example of the automatic stay's governmental exceptions, found that Congress did not intend for the Code to preempt all state laws. *Id.* at 4141. In addition, the Court found support for its holding restricting the preemptive power of the Code in repeated congressional emphasis on its "goal of protecting the environment against toxic pollution." *Id.* While this decision represents an important affirmation of the public health and safety goals

## CONCLUSION

Both state and federal environmental laws that address the problem of cleaning up hazardous wastes rely in part on the mandatory injunction as a tool to force rapid clean up and to shift the costs to responsible parties. When those parties, facing the obligations under such an injunction, seek the shelter of the federal bankruptcy system, it is unclear whether the Bankruptcy Code relieves them of the legal obligations that arise from their role in the improper disposal of wastes. The first level of relief in the Code, the automatic stay provision, suggests that such injunctions may be enforced; however, two courts of appeals have reached opposite conclusions: one court determined that injunctive remedies may be enforced under the automatic stay exceptions; another court found that injunctions that cost money are unenforceable money judgments. The applicability of the Code's discharge provision to injunctions is similarly uncertain, since the Court in *Ohio v. Kovacs* largely confined that case to its peculiar set of enforcement facts. The one clear message that emerges is that if states and the federal government want to ensure that the bankruptcy system will not shield polluters, they must decide to treat those polluters like criminals.

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of states and the federal government, its inconsistency with *Kovacs* is striking. This decision again leaves unanswered important questions of conflict between bankruptcy relief and environmental protection.